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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 75

ILLINOIS CENTRAL RAILROAD COMPANY,
PETITIONER,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1929

CERTIORARI GRANTED MAY 27, 1929

(34,183)

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 8014

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 27, 1927.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1928, of said Court, before the Honorable Robert E. Lewis, the Honorable William S. Kenyon and the Honorable John H. Cotteral, Circuit Judges.

Attest: E. E. KOCH,
Clerk of the United States Circuit Court
(Seal) of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-seventh day of October, A. D. 1927, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Illinois Central Railroad Company was Plaintiff in Error and G. I. Crail, doing business as P. McCoy Fuel Company, was Defendant in Error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 Complaint At Law.

In the District Court of the United States for the District of Minnesota, Fourth Division.

G. I. Crail, doing business as P. McCoy Fuel Company, Plaintiff,

vs.

Illinois Central Railroad Company, Defendant.

Plaintiff complains of defendant and alleges that:

I.

(a) Plaintiff was during the times hereinafter mentioned, and still is, a resident, inhabitant, and citizen of said district of Minnesota, fourth division.

(b) Plaintiff is, and during the times hereinafter mentioned was, engaged in the fuel business at Minneapolis, Minnesota. Plaintiff's yard and place for delivery by common carrier of all coal transported to it, including that referred to herein is, and during the times herein referred to was an industry siding located at 10th Avenue North East and Harrison Street, Minneapolis, Minnesota.

II.

Defendant was during the times hereinafter mentioned, and still is, a railway corporation of the state of Illinois, and a citizen thereof, and was during the times hereinafter mentioned, and still is, a common carrier of freight with its connecting lines from Royalton, Illinois, to Minneapolis, Minnesota.

III.

(a) September 30, 1922, at Royalton, Illinois, defendant as initial carrier received for transportation over its lines and those of its connecting carriers to Minneapolis, Minnesota, 88,700 pounds of southern Illinois number 2 nut soft coal, contained in PMCK&Y car number 91352, and then and there

issued and delivered its receipt or bill of lading therefor.

2 (b) While said coal was in transit plaintiff purchased it, became the owner thereof, and it was diverted to plaintiff at his said yard at 10th Avenue North East and Harrison Street, Minneapolis, Minnesota.

(c) October 17, 1922, defendant caused to be delivered to plaintiff at its said yard at Minneapolis, Minnesota, 83200 pounds of said coal. Defendant or its connecting carriers lost 5500 pounds thereof.

(d) Said shipment was transported and said 83200 pounds of coal was delivered at destination within a reasonable length of time for said transportation.

(e) The fair market value of said 5500 pounds of coal lost from said shipment at destination on October 17, 1922, when it should have been delivered there as aforesaid, less lawful freight charges, was $26.87. No part of said sum has ever been paid.

IV.

This is a suit proceeding arising under the Act of Congress of February 4, 1887, and the several acts amendatory thereof, including the so-called Cummins Amendment, an act of Commerce of March 4, 1915, 38 Stat. L. 1196 as amended by 41 Stat. L. 494, and is a suit and proceeding arising under the Constitution and laws of the United States.

V.

Wherefore, plaintiff demands judgment against the defendant for $26.67 with interest thereon and plaintiff's costs and disbursements according to law.

Minneapolis, Minnesota, March 10, 1923.

STANLEY B. HOUCK
Attorney for Plaintiff,
746 McKnight Building,
Minneapolis, Minnesota.

(Endorsed) Filed March 10th, 1923. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

Answer

Defendant for its answer to the complaint of the plaintiff in the above entitled action denies each and every allegation, matter and thing in said complaint contained.

3 Wherefore defendant demands judgment that plaintiff take nothing by this action, and for defendant's costs and disbursements herein.

BROWN & GUESMER,
Attorneys for Defendant,
1000 Met. Life Bldg.,
Minneapolis, Minnesota.

(Endorsed) Due and personal service of the within answer is hereby admitted this 6 day of April, 1923. Stanley B. Houck, Attorney for Plaintiff. Filed April 6-1923. Joel M. Dickey, Clerk, By Thomas H. Howard, Deputy.

Stipulation of Facts

The parties to the above entitled action, through their respective attorneys, agree that he following facts may be received in evidence at the trial of the action in the same manner and with the same effect as if proved by competent testimony, subject to objection by either party on the ground that any of said facts are immaterial or irrelevant.

I.

(a) Plaintiff was during the times hereinafter mentioned, and still is, a resident, inhabitant, and citizen of said district of Minnesota, fourth division.

(b) Plaintiff is, and during the times hereinafter mentioned was, engaged in the fuel business at Minneapolis, Minnesota. Plaintiff's yard and place for delivery by common carrier of all coal transported to it, including that referred to herein, is, and during the times herein referred to was, an industry track located at 10th Avenue North East and Harrison Street, Minneapolis, Minnesota.

II.

Defendant was during the times hereinafter mentioned, and still is, a railway corporation in the state of Illinois, and a citizen thereof, and was during the times hereinafter mentioned, and still is, a common carrier of freight, with its connecting lines from Royalton, Illinois, to Minneapolis, Minnesota.

III.

(a) September 30, 1922, at Royalton, Illinois, defendant as initial carrier received for transportation over its lines and those of its connecting carriers to Minneapolis,
4 Minnesota 88700 pounds of southern Illinois number 2 nut soft coal, contained in PMCK&Y car number

91352, and then and there issued and delivered the receipt or bill of lading therefor.

(b) While said coal was in transit, plaintiff purchased it, became the owner thereof, and it was diverted to plaintiff at his yard at 10th Avenue North East and Harrison Street, Minneapolis, Minnesota.

(c) October 17, 1922, defendant caused to be delivered to plaintiff at its said yard at Minneapolis, Minnesota, 83200 pounds of said coal. Defendant, or its connecting carriers, lost 5500 pounds thereof.

(d) Said shipment was transported and said 83200 pounds of coal was delivered at said destination within a reasonable length of time for said transportation.

IV.

This is a suit and proceeding arising under the Act of Congress of February 4, 1887, and the several acts amendatory thereof, including the so-called Cummins Amendment, an Act of Congress of March 4, 1915, 38 Stat. L. 1196, as amended by 41 Stat. L. 494, and is a suit and proceeding arising under the Constitution and Laws of the United States.

V.

(a) At the destination of said shipment on October 17, 1922, for a long time prior thereto, and ever since, coal of the kind, size and grade contained in said shipment and coal of many other kinds, sizes and grades, had a free and ready market in any quantity, whether less or more than one ton, or by the carload or by a number of carloads. The sales and purchases in said market from day to day were substantial in number and volumes.

(b) On or about October 17, 1922, at said destination the fair, reasonable, average, market value and price, delivered to the purchaser at his place of business or home, of the kind, size and grade of coal contained in said shipment in lots of 5500 pounds was $13.00 per ton, and said coal in said quantities could not then be purchased for less in said market.

(c) On or about October 17, 1922, the fair, reasonable, average market value and price for carload lots of from 60,000 to 120,000 pounds, where the coal became the purchaser's property at the time of shipment and he received
5 delivery on track at destination in carload lots, paid the freight and handled the shipment himself, was

$5.50 per ton f. o. b. Royalton, Illinois. Quantities less than carload lots were not obtainable at said time and place at said price.

(d) On or about October 17, 1922, the fair, reasonable, average market value and price for carload lots on track at Minneapolis was $5.75 per ton, plus freight where the purchaser paid the freight, received the shipment on track and himself handled the shipment. Quantities less than carload lots were not obtainable at said time and place at said price.

VI.

Defendant has paid plaintiff nothing whatsoever on account of the loss of coal aforesaid.

VII.

The lawful freight charges applicable to said shipment were $3.30 per ton. Said freight charges were not paid on the 5500 pounds lost.

VIII.

The coal contained in said shipment had not been sold nor had its sale been contracted for prior to the arrival of said shipment nor was it sold or contracted for sale on October 17, 1922. Plaintiff lost no sale because said coal was lost. Plaintiff did not at any time purchase any coal for the purpose of replacing the coal lost from this shipment. Plaintiff did, however, both before and after delivery of said shipment, purchase coal of the same kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine in the regular and customary course of his business, and plaintiff ordinarily purchased his coal exclusively in carload lots f. o. b. mines, and on and after said October 17, 1922 plaintiff had on hand coal of the kind, size and grade in question in quantities sufficient to meet the demands of his business.

Dated at Minneapolis, Minnesota April 6, 1923.

STANLEY B. HOUCK
Attorneys for Plaintiff.

BROWN & GUESMER
Attorneys for Defendant.

(Endorsed) Filed April 6, 1923, Joel M. Dickey, Clerk, By Thomas H. Howard, Deputy.

6 Bill of Exceptions.

United States District Court District of Minnesota, Fourth Division.

G. I. Crail, doing business as P. McCoy Fuel Company, Plaintiff,

vs.

Illinois Central Railroad Company, Defendant.

Now Be It Remembered That on the trial of this cause at this term, on this, the 29th day of October, A. D. 1926, in the District Court of the United States for the District of Minnesota, Fourth Division, the Honorable William A. Cant, Judge presiding, the plaintiff appearing by his attorney, Mr. Stanley B. Houck, of Minneapolis, Minnesota, and the defendant appearing by its attorneys, Mr. Edward C. Craig, of Chicago, Illinois, and Messrs. Guesmer, Carson, Brown & Loughin, and Mr. Edwin C. Brown, of Minneapolis, Minnesota, the following proceedings were had:

A stipulation waiving a jury and agreeing to a trial of the said case by the court without a jury, was entered into between the parties and was filed, which stipulation was in words and figures as follows, to-wit:

7 Stipulation Waiving Jury.

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled action, through their respective attorneys, that said action, now on the September term calendar of said Court, may be tried before the Court without a jury, a jury being hereby waived by both of said parties.

Dated this 28th day of October, 1926.

STANLEY B. HOUCK
Attorney for Plaintiff.

E. C. CRAIG
Chicago, Illinois.

BROWN & GUESMER
EDWIN C. BROWN and
CHAS. A. LOUGHIN
Minneapolis, Minnesota.
Attorneys for Defendant.

Be It Further Remembered That the parties to this suit entered into a stipulation as to the facts in the case, which stipulation was reduced to writing and and signed by the attorneys

of the respective parties and filed with the Clerk, which stipulation of facts was in words and figures as follows, to-wit:

8 Stipulation of Facts.

The parties to the above entitled action, through their respective attorneys, agree that the following facts may be received in evidence at the trial of the action in the same manner and with the same effect as if proved by competent testimony subject to objection by either party on the ground that any of said facts are immaterial or irrelevant, and this stipulation shall supersede the stipulation of facts heretofore filed herein.

I.

(a) Plaintiff was during the times hereinafter mentioned and still is a resident, inhabitant and citizen of said District of Minnesota, Fourth Division.

(b) Plaintiff is, and during the times hereinafter mentioned was, engaged in the fuel business at Minneapolis, Minnesota. Plaintiff, during all the times herein referred to, has conducted his said business in all respects in a manner substantially similar to the manner in which other similar fuel businesses in Minneapolis aforesaid were then conducted.

(c) The place for delivery by common carrier of coal transported to the plaintiff, and other similar fuel dealers at Minneapolis, including the coal referred to herein, is, and during the times herein mentioned was an industry, team, or other railroad delivery track, located on any railroad in Minneapolis, and, in the case of the car of coal herein referred to, was an industry track located at 10th Avenue Northeast and Harrison Street, Minneapolis, Minnesota, at which place plaintiff's coal yard was and is situated.

II.

The defendant was during the times hereinafter mentioned, and still is, a railway corporation in the State of Illinois, and a citizen thereof, and, with its connecting lines, was during the times hereinafter mentioned, and still is, a common carrier of freight from Royalton, Illinois, to Minneapolis, Minnesota.

III.

9 (a) On September 30, 1922, at Royalton, Illinois, defendant as initial carrier received for transportation over its lines and those of its connecting carriers at Minneapolis, Minnesota, P. M. C. K. & Y. car number 91352, containing 88,700 pounds of Southern Illinois No. 2 nut soft coal, and

then and there issued and delivered a receipt or bill of lading for the said carload of coal.

(b) While said car of coal was in transit, plaintiff purchased the said carload of coal and became the owner thereof, and the said car was diverted to the plaintiff, and was, in accordance with plaintiff's directions thereafter given, delivered to the plaintiff on the said industry track at the plaintiff's said coal yard at Minneapolis, Minnesota.

(c) On October 17, 1922, the defendant caused to be delivered to plaintiff on the said industry track at the plaintiff's said coal yard at Minneapolis, Minnesota, the said car number 91352. The said car at that time contained 83,200 pounds of coal, being 5500 pounds of coal less than the said 88,700 pounds of coal, which said portion of said carload of coal, consisting of 5500 pounds of coal, had been lost in transit.

(d) Said car of coal was delivered at said destination within a reasonable time for said transportation.

IV.

This is a suit and proceeding arising under the Act of Congress of February 4, 1887, and the several acts amendatory thereof, including the so-called Cummins Amendment, an Act of Congress of March 4, 1915, 38 Stat. L. 1196 as amended by 41 Stat. L. 494, and is a suit and proceeding arising under the Constitution and Laws of the United States.

V.

(a) At the destination of said shipment, on or about October 17, 1922, and for some time prior and subsequent thereto, coal of the kind, size and grade contained in said shipment and coal of many other kinds, sizes and grades, had a free and ready market in any quantity, whether less or more than one ton, or by the carload or by a number of carloads. The sales and purchases in said market from day to day were substantial in number and volume. Purchases of carload lots, containing 60,000 pounds or more, in said market are termed wholesale purchases and purchases of less than carload
10 lots are termed retail purchases.

(b) On or about October 17, 1922, and for a substantial period of time prior and subsequent thereto, the fair, average, reasonable, market value and price of carload lots of said Southern Illinois No. 2 nut soft coal containing 60,000 pounds or more where the coal became the purchaser's property at the time of shipment, or it was purchased in transit, as was done by the plaintiff in this case, and purchaser re-

ceived delivery in carload lots in the car on any industry, team, or other railroad delivery track located on, or connected with, any railroad in Minneapolis, paid the freight and unloaded the shipment himself, including a delivery such as was made to plaintiff in this case, was $5.50 per ton f. o. b. original shipping point of the carload, which in this instance was f. o. b. Royalton, Ill. Quantities of less than carloads were not obtainable in said market at said time and place at said price.

(c) On or about October 17, 1922, the fair, reasonable, average market value and price at Minneapolis, Minnesota, of carload lots of Southern Illinois Number 2 nut soft coal on track at Minneapolis as aforesaid, including the said industry track, was $5.75 per ton, plus freight, where the purchaser paid the freight, received the shipment on track and himself unloaded the shipment as was done by the plaintiff in this case. Quantities of less than carload lots were not obtainable in said market at said time and place at said price.

(d) On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser in lots of 5500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less. At and prior to the time of delivery of said shipment less than carload lots of coal had not been sold in said market and delivered to or into any car on track as aforesaid.

VI.

Defendant has paid plaintiff nothing whatsoever on account of the loss of the coal aforesaid.

11 VII.

The lawful freight charges applicable to said shipment were $3.30 per ton. This was at the carload tariff rate. The freight charges were paid on the said car of coal so delivered to the plaintiff at the time aforesaid, based upon 83,200 pounds of coal therein.

VIII.

The coal contained in said shipment had not been sold by plaintiff nor had its sale been contracted for prior to the arrival of said shipment, nor was it sold or contracted for sale on October 17, 1922, but the coal contained in said car PMCK&Y

No. 91352 was added to the general stock of coal of the plaintiff at Minneapolis, aforesaid, and had this 5500 pounds of coal been contained in this car it would have been added to the general stock of coal of the plaintiff at Minneapolis, aforesaid. Plaintiff lost no sale of coal because the said car of coal contained only 83,200 pounds of coal. Plaintiff did not at any time purchase any coal for the purpose of replacing any coal lost from this shipment, except the purchase in carload lots to maintain his stock of said Southern Illinois No. 2 nut soft coal, of that kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine in the regular and customary course of his business; and plaintiff and other fuel dealers at said time ordinarily purchased coal exclusively in carload lots f. o. b. mine. That had this car of coal when shipped from the mine contained only 83,200 pounds of coal, the plaintiff would have purchased it. That on and after said October 17, 1922, plaintiff had on hand coal of the kind, size and grade in question, in quantities sufficient to meet the demands of his business and the failure to receive the 5500 pounds of coal aforesaid in no way interfered with the maintaining by the plaintiff of his ordinary and usual stock of coal, nor did he purchase any coal to take its place, except by the purchase of coal in carload lots of $5.50 per ton f. o. b. mine in the regular and cus-
12 tomary course of his business. Defendant's services in the transportation of the coal in this case ended in the delivery of the car containing the coal upon the said industry track. The unloading of the coal and the further handling of the same for sale or delivery in less than carload lots was at the expense of the plaintiff.

Dated at Minneapolis, Minnesota, this 27 day of Sept., A. D. 1926.

STANLEY B. HOUCK,
Attorney for Plaintiff.

BROWN & GUESMER,
EDWIN C. BROWN,
CHARLES A. LOUGHIN,
Minneapolis, Minn.

E. C. CRAIG,
Chicago, Ill.
Attorneys for Defendant.

Be It Further Remembered That in accordance with the provisions of the said stipulation the plaintiff filed his written objections to the admission in evidence of portions of the facts

agreed to in the said stipulation of facts, which objections were in words and figures as follows, to-wit:

13 Plaintiff's Objections to Evidence.

The above named plaintiff objects to the admittance in evidence and consideration by the Court of the following portions of the Stipulations of Facts dated September 27, 1926, heretofore filed in said case on the ground that said facts and evidence are immaterial and irrelevant:

I.

That portion of section V, subdivision (a) which reads: "Purchases of carload lots, containing 60,000 pounds or more, in said market are termed wholesale purchases and purchases of less than carload lots are termed retail purchases."

II.

That portion of section V, subdivision (d) which reads: "At and prior to the time of delivery of said shipment less than carload lots of coal has not been sold in said market and delivered to or into any car on track as aforesaid."

III.

All of section VIII of said Stipulation; and each separate fact stated in said section VIII considered separate and distinct from each other fact therein stated.

Dated at Minneapolis, Minnesota, this 25th day of October, 1926.

STANLEY B. HOUCK,
Attorney for Plaintiff,
310 McKnight Building,
Minneapolis, Minnesota.

Be It Further Remembered That in accordance with the provisions of the said stipulation the defendant filed its written objections to the admission in evidence of portions of the facts agreed to in the said stipulation of facts, which objections were in words and figures as follows, to-wit:

14 Defendant's Objections to Admissibility of Certain Stipulated Facts.

Defendant hereby objects to the admissibility in evidence, on the trial of the above cause now on the jury waived September term calendar of the above named court, of the whole

or any part of the following portions of the stipulated facts herein as set forth in the Stipulation of Facts dated September 27, 1926:

1. That part of paragraph (b) of V of said Stipulation reading as follows:

"Quantities of less than carloads were not obtainable in said market at said time and place at said price."

2. That part of paragraph (c) of V of said Stipulation reading as follows:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price."

3. That part of paragraph (d) of V of said Stipulation reading as follows:

"On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less."

The grounds of defendant's said objections to the said evidence and facts thereby shown are that said evidence and facts thereby shown, and the whole and every part thereof, are immaterial and irrelevant to any issue in this case.

Dated this 29 day of October, 1926.

EDWARD C. CRAIG,
Chicago, Illinois.

BROWN & GUESMER,
EDWIN C. BROWN and
CHAS. A. LOUGHIN,
Minneapolis, Minnesota.
Attorneys for Defendant.

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15 Be It Further Remembered That, in accordance with the provisions of the stipulation of facts, the defendant made during the progress of the trial its motion to the Court that the Court make and file its order striking from the record, as immaterial and irrelevant to any issue in the

case, that portion of paragraph (b) of V of said stipulation reading as follows:

"Quantities of less than carloads were not obtainable in said market at said time and place at said price."

Be It Further Remembered That, in accordance with the provisions of the stipulation of facts, the defendant made during the progress of the trial its motion to the Court that the Court make and file its order striking from he record, as immaterial and irrelevant to any issue in the case, that portion of paragraph (c) of V of said stipulation reading as follows:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price."

Be It Further Remembered That, in accordance with the provisions of the stipulation of facts, the defendant made during the progress of the trial its motion to the Court that the Court make and file its order striking from the record, as immaterial and irrelevant to any issue in the cae, that portion of paragraph (d) of V of said stipulation reading as follows:

"On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less."

16 Be It Further Remembered That the said case came on to be heard on the aid stipulation of facts subject to the objections of the said parties to portions thereof, and the said case was heard by the Court without a jury on the said stipulation of facts subject to the said objections, no other evidence having been introduced by either party.

Be It Further Remembered That at the close of all the evidence, and during the progress of the trial, the defendant made and filed its motion in writing that the Court make and file its order that judgment be entered herein against said defendant and in favor of the plaintiff for the sum of $15.82 and interest thereon at the rate of 6 per cent per annum

since October 17, 1922, together with plaintiff's costs and disbursements, which motion was in words and figures as follows, to-wit:

Motion by Defendant for Judgment.

Now comes the Illinois Central Railroad Company, defendant above named, at the close of all the evidence and during the progress of the trial, and before the court has made any findings herein and before judgment is rendered by the court, and moves the court for an order that judgment be entered herein, against said defendant and in favor of plaintiff, for the sum of $15.82 and interest thereon at the rate of 6% per annum since October 17, 1922, together with plaintiff's costs and disbursements accrued and expended to date, and for no more.

The said sum of $15.82 is the value of the lost portion, 5500 pounds, of the carload of coal involved herein, based and computed upon the agreed carload market value of such coal at Minneapolis on the date of delivery, October 17, 1922, $5.75 per ton.

ILLINOIS CENTRAL RAILROAD COMPANY, Defendant,
By Edward C. Craig,
Brown & Guesmer,
Edwin C. Brown and
Chas. A. Loughlin,
Its Attorneys.

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17 Be It Further Remembered That the Court, after hearing the arguments of counsel on the case so submitted and on the said motions, took the case under advisement until the 23d day of September, A. D. 1927, at which time the Court overruled the said objections of the plaintiff to the admission in evidence, as irrelevant and immaterial, of the portions of the said stipulation of facts with reference to which the plaintiff had made his said objections above set forth; overruled the said objections of the defendant to the admission in evidence, as irrelevant and immaterial, of the portions of the said stipulation of facts with reference to which the defendant had made its said objections above set forth; overruled the motions of the defendant in which the defendant moved the Court to strike from the record, as being irrelevant and immaterial, those certain portions of the stipulation of facts above specified in defendant's said motions, to each of which rulings of the Court the

defendant then excepted and now excepts; denied the motion of the defendant above set forth and made at the close of all the evidence and during the progress of the trial that the Court make and file its order that judgment be entered herein against said defendant and in favor of the plaintiff for the sum of $15.82 and interest, costs and disbursements; and made and filed its order that judgment be entered herein against said defendant and in favor of the plaintiff for the sum of $26.68 with interest thereon at the rate of 6 per cent per annum since October 17, 1922, and for costs and disbursements, to which rulings of the Court the defendant then and there excepted and now excepts.

Be It Further Remembered That the Court filed its special findings of facts and conclusions of law and by its conclusion of law found that

"Plaintiff is entitled to judgment against defendant for the sum of $26.68, with interest thereon at the rate of 6 per cent per annum since October 17, 1922, and for his costs and disbursements herein."

To this conclusion of law and ruling this defendant then and here excepted and now excepts.

18 Be It Further Remembered That in and by the Court's memorandum attached to its findings of fact, conclusions of law and order for judgment, and by said order made a part thereof, the Court found that the revised stipulation of facts did not materially differ from the former stipulation of facts, which finding is stated in said memorandum as follows:

"This court is not satisfied that the amended stipulation of facts justifies the conclusion that the case has been substantially changed."

To this finding and ruling this defendant then and there excepted and now excepts.

Be It Further Remembered That judgment was thereupon then and there entered by the Court for the plaintiff and against the defendant for the sum of $34.58 and costs, in accordance with the findings of facts and conclusions of law, to the entering of which judgment the defendant then and there excepted and now excepts.

And the defendant prays that this its above bill of exceptions be allowed, settled and signed.

Dated this 21st day of October, 1927.

EDWARD C. CRAIG,
GUESMER, CARSON,
BROWN & LOUGHIN,
EDWIN C. BROWN,
Attorneys for Defendant.

---

19 Stipulation for Approval of Bill of Exceptions.

It is hereby stipulated and agreed by and between the parties to the above entitled action, through their respective attorneys, that defendant's bill of exceptions hereto attached may be allowed, settled and signed by the Court, without other or further notice to either party hereto.

Dated this 21st day of October, 1927.

STANLEY HOUCK
Attorney for Plaintiff.
EDWARD C. CRAIG
GUESMER, CARSON, BROWN &
LOUGHIN
EDWIN C. BROWN
Attorneys for Defendant.

Certificate of District Judge to Bill of Exceptions

Having examined the defendant's bill of exceptions hereto attached and having found it to be in accordance with
20 the facts, and having read the above stipulation of Counsel for approval thereof, defendant's bill of exceptions hereto attached is hereby settled and allowed.

Dated this 22nd day of October, 1927.

WM. A. CANT
United States District Judge.

(Endorsed) Filed Oct. 22, 1927, Joel M. Dickey, Clerk By Thomas H. Howard, Deputy.

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21 Findings of Fact and Conclusions of Law.

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1927.

September 23, 1927.

Friday morning; Court opened pursuant to adjournment.

Present: Honorable Wm. A. Cant, Judge.

G. I. Crail, doing business as P. McCoy Fuel Company, Plaintiff,

vs.

Illinois Central Railroad Company, Defendant.

The above-entitled action came on regularly for trial before the court without a jury, Mr. Stanley B. Houck, of Minneapolis, Minnesota, appearing for the plaintiff, and Mr. Edward C. Craig, of Chicago, Illinois, and Messrs, Guesmer, Carson, Brown & Loughin and Mr. Edwin C. Brown, of Minneapolis, Minnesota, appearing for the defendant. Mr. George A. Kinsley, of Minneapolis, Minnesota, appeared as amicus curiae. The court having considered the amended stipulation of facts in said case and the arguments of counsel therein and being fully advised in the premises, now makes and files the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. That at all times herein mentioned plaintiff was engaged at Minneapolis, Minnesota, in the business of buying and selling coal, and owned and operated a yard for the handling and distribution of coal received by rail. That delivery of coal to plaintiff at said yard, in carload lots, was commonly made on an industry railroad track, so called, at said yard.

2. That on September 30, 1922, at Royalton, Illinois, defendant as initial common carrier received for transportation to Minneapolis, Minnesota, under a uniform bill of lading, a carload of 88,700 pounds of Southern Illinois No. 2 nut soft coal; and that during transit the coal became the property of the plaintiff.

3. That on October 17, 1922, defendant caused to be
22 delivered to plaintiff, on said industry track, in the car in which said shipment had been made, at his

said yard at Minneapolis, 83,200 pounds of said coal; that 5,500 pounds of said coal was lost in transit; and that said transportation and delivery were made within a reasonable time.

4. That at said destination, on and about said October 17, 1922, there existed a free and ready market for the sale and purchase of coal of said kind, size and grade, both in carload and less than carload lots. Purchases of carload lots, containing 60,000 pounds or more, in said market, were then termed wholesale purchases, and purchases of less than carload lots were termed retail purchases.

5. That on October 17, 1922, and for a substantial period of time prior and subsequent thereto, the fair, average and reasonable market value and price of carload lots, at Minneapolis, Minnesota, containing 60,000 pounds or more of coal, such as that involved in this action, where the coal became the purchaser's property at the time of shipment, or or where it was purchased in transit, as was done by the plaintiff in this case, and where the purchaser received delivery in carload lots in the car on any industry, team or other railroad delivery track, located on or connected with any railroad in said city, and where the purchaser paid the freight and unloaded the shipment himself, including a delivery, such as was made to plaintiff in this case, was $5.50 per ton f. o. b. original shipping point of the carload, which in this instance was f. o. b. Royalton, Illinois. Quantities of less than carload lots were not obtainable in said market at said time and place at said price.

6. That on or about October 17, 1922, the fair, reasonable and average market value and price at Minneapolis,
23 Minnesota, of carload lots of coal such as that involved in this action, on track at Minneapolis as aforesaid, including said industry track, was $5.75 per ton, plus freight, where the purchaser paid the freight, received the shipment on track, and himself unloaded such shipment, as was done by the plaintiff in this case. Quantities of less than carload lots were not obtainable in said market at said time and place at such price.

7. That on or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable and average market value and price of coal such as that here involved, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5,500 pounds, was $13. per ton, including freight, and said

coal in said quantity to be delivered to the purchaser, for consumpetion or any other use, could not at said time have been purchased in said market for less than said amount. That at and prior to the time of delivery of said shipment less than carload lots of coal had not been sold in said market and delivered to or into any car on track as aforesaid.

8. That the lawful freight charges applicable to said shipment were $2.30 per ton; and that said freight charges were not paid on the 5,500 pounds lost.

9. That the coal contained in said shipment had not been sold, nor had its sale been contracted for by plaintiff prior to, or at the time of delivery at destination; that the plaintiff lost no sale because said coal was lost; that plaintiff did not at any time purchase 5,500 pounds of coal for the purpose of replacing the coal lost from this shipment; that plaintiff did, however, both before and after delivery of said shipment, purchase coal of the same kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine, in the
24 regular and customary course of his business; and that on and after said October 17, 1922, plaintiff had on hand coal of said kind, size and grade in quantities sufficient to meet the demands of his business.

10. That defendant has paid plaintiff nothing whatsoever on account of the loss of said 5,500 pounds of coal.

Conclusions of Law.

That plaintiff is entitled to judgment against defendant for the sum of $26.68, with interest thereon at the rate of six per cent. per annum, since October 17, 1922, and for his costs and disbursements herein.

Let judgment be entered accordingly.

The memorandum heretc attached is hereby made a part hereof.

A stay of proceedings for thirty days from the date hereof is hereby ordered.

Dated September 23, 1927.

By he Court

WM. A. CANT
U. S. District Judge.

25 (Judgment.)

Wherefore, by reason of the premises aforesaid it is now by the Court

Considered, ordered and adjudged that the plaintiff G. L. Crail, doing business as P. McCoy Fuel Company, do have and recover of and from the defendant Illinois Central Railroad Company, the sum of Thirty four and 58/100 Dollars ($34.58), together with his costs and disbursements in this behalf expended to be taxed, and that said plaintiff do have execution therefor.

Further ordered that all further proceedings herein except the taxation of costs and entry of judgment therefor be and the same are hereby stayed for a period of thirty (30) days to enable this defendant to prepare and present a bill of exceptions and make a motion for a new trial.

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26 Memorandum.

This is an action brought by the consignee of a carload of coal against the railroad company which had undertaken to transport the coal. The amount of the shipment was 88,700 pounds. Of this amount 5,500 pounds were lost in transit. The destination was Minneapolis, Minnesota, and the delivery was on an industry railway track running alongside of or into plaintiff's coal yard at that place. It is agreed that at the time and place of delivery, coal of the kind here in question was worth $5.75 per ton, plus freight, in carload lots of from 60,000 to 120,000 pounds. It is also agreed that the same kind of coal at retail in the Minneapolis market, at the time in question, delivered at the place of business or home of the consumer, was worth $9.70 per ton, plus freight. Plaintiff claims that he is entitled to recover at the rate of $9.70 per ton for the coal which was lost. Defendant admits liability, but claims that the amount of recovery should be limited to $5.75 per ton. No freight was paid on the coal which was lost and that item may be eliminated from the discussion. The facts were presented to the court originally by stipulation and the opinion of this court thereon is found at 2 Fed. (2d) 287. That case was reversed by the Circuit Court of Appeals and the opinion thereon is found at 13 Fed. (2d) 459. The appellate court there held that a recovery should be had on the basis of $9.70 per ton. Thereafter the stipulation of facts was amended and amplified and with the stipulation so changed the case was again presented to the court on a second trial. This court is not satisfied that the amended stip-

ulation of facts justifies the conclusion that the case has been substantially changed. Following the decision of the Court of Appeals, therefore, it is the duty of this court to allow a recovery at the rate of $9.70 per ton for the coal which was lost, and this will be done.

The case, however, is of rather unusual interest and importance. It is assumed that it is not inconsistent with the fullest measure of respect for the Appellate Court, to offer further suggestions in the interest of justice upon the questions involved. It it is for this court to follow the decision of the Appellate Tribunal, but that Tribunal itself may at some time wish to re-examine the matters which are here in con-
27 troversy. It is in that light and for that purpose only that the suggestions which follow, are made.

The case at bar is the ordinary case of a commodity purchased in bulk for the purpose of selling the same again at an advance, if possible, but without any necessity or occasion for going into the local market to replace any portion of the commodity which might be lost in transit. Under the circumstances hereinbefore set forth, as amplified by the stipulation of fact, what is the measure of damages in this case? Is plaintiff entitled to recover at the rate of $5.75 per ton, or at the rate of $9.70 per ton for the coal which has been lost?

Basically, the case is one for the recovery of damages for breach of contract. This particular controversy belongs to a sub-class of breach of contract cases. It involves a breach by a common carrier of its agreement to transport and deliver freight. The same general rules apply here as in all other cases of breach of contract. It will be seen that certain subsidiary rules are specially applicable. The difficulty in such cases arises in estimating the amount of the loss which the plaintiff has sustained. The courts have said that in this connection each case must be governed by its own facts. Mangin vs. Dinsmore, 62 N. Y. 35. Magdeburg General Insurance Co. vs. Paulson, 29 Fed. 530, 532. This does not mean that the cases are beyond the rules. They are not; it is at this point that the subsidiary rules intervene.

In the former opinion of this court certain outstanding features of the case were not made sufficiently clear.

1. Cases of the character here in question fall into certain groups or classes, and rules which apply to one class quite often do not apply to another. A classification upon one basis is as follows:

a. Cases where general damages only are involved.

b. Cases where special damages are claimed.

Upon another basis the classification may be as follows:

a. Cases where the consignee is under no necessity or compulsion to go into the local market and purchase commodities with which to replace those which have been lost.

b. Cases where by reason of special circumstances the consignee is under some reasonable compulsion to replace the lost commodity by purchasing in the local market.

There are doubtless other classifications of less importance.

The classifications above specified may very nearly duplicate each other. That is, all cases where there is no necessity of replacing the lost commodity would generally fall under the head of general damage cases; and very generally cases where the lost commodity must be replaced would fall under the head of special damage cases, but the distinguishing features of both classifications are important, because sometimes one basis of classification is emphasized by the courts and sometimes another, and because collectively they furnish the
28 bases for the various rules which are announced; which rules, as applied to a particular situation may be quite correct, but which if applied to a different set of facts may work an injustice.

2. The fundamental rule in all cases involving damages for breach of contract is that the damages recoverable are such only as, in theory of law, may fairly be said to have been within the contemplation of the parties when the contract was made.

17 C. J. 742-746, Sec. 76.
Harvey vs. Conn. & Passumpsic R. R. 124 Mass. 421, 423-4.

By the expression "general damages" is meant such damages as follow naturally and in the usual course of things from a breach of contract. In all ordinary cases it is general damages only which are held to have been within the contemplation of the parties. In such cases the question is what is the immediate loss without going beyond the first step.

17 C. J. 712, Sec. 20.
17 C. J. 742, Sec. 76.

"Special damages" are such as do not follow naturally or in the usual course of things from such a breach, but are such as arise out of unusual or special circumstances. Such cir-

cumstances, however, give rise to no claim for additional or special damages on account thereof, unless the circumstances were known in advance by the respective parties, and unless the consequences of the breach and loss under such circumstances were known to and in contemplation of the parties when the contract was made.

17 C. J. 712, Sec. 76.
17 C. J. 746, Sec. 77.

3. In this case plaintiff sues for general damages only. There is no allegation of special damages in the complaint and no proof thereof in the stipulation of facts.

Here, if the fact is at all important, there is no claim or proof that, prior to the loss in question, defendant had any knowledge that the coal was being purchased for the retail trade; and the circumstance of such intended use appears, if at all, only as a matter of inference from the stipulated facts.

4. In cases such as the one at bar, therefore, where general damages only are claimed, a recovery for proximate loss only can be had,—a loss which follows naturally and in the usual course of things from the breach of contract. This is an unvarying rule to which there are no exceptions. With subsidiary rules there may be variations or exceptions. In such cases as this the court does not go beyond the first step, nor concern itself with consequences which are remote. Southern Pacific Co. vs. Darnell-Taenzer Co. 245 U. S. 531, 533. The question is what loss plaintiff had sustained at the moment the car of coal was switched into his yard, with the 5,500 pounds missing therefrom. It is not what loss might be figured out at a later time under entirely new and different conditions. Plaintiff's cause of action accrued at once upon failure to deliver and without waiting for later events. Southern Pacific Co. vs. Darnell-Taenzer Co. supra, p. 534.
29 It made no difference whether the coal was to be sold at wholesale or at retail, or was to be consumed by plaintiff himself. The proximate loss "is the loss of what the contractee would have had if the contract had been performed." Chi. M. & St. P. Ry. Co. vs. McCaull-Dinsmore Co. 253 U. S. 97. In this case that would have been the 5,500 pounds of coal in the car, which amount of coal at the time of delivery, was missing therefrom

5. A subsidiary rule, applicable in cases of this character, is that plaintiff is entitled to recover the value of the commodity which has been lost, as that value would have been at the time and place of delivery if delivery had been made as agreed.

This rule is more elastic. In its application it does not always mean the same thing. Courts are often content with announcing the general rule without discussion as to its application. In various cases there is no difficulty about such application. In other cases the difficulty is very real. In various cases, as will be seen, this rule does not apply at all in any literal sense and would provide no adequate relief.

In the case at bar the broader, general and controlling rules must constantly be kept in mind; the plaintiff is entitled to be made whole. He is not suing for coal, but for money. He is entitled to the money equivalent of that which has been lost. There is no occasion for punishing the defendant by allowing excessive damages. There is no occasion for allowing plaintiff to realize a gain out of the transaction. He is not to receive a reward. He is to receive fair and reasonable compensation for his loss.

6. An unusual and outstanding feature of this case is the fact agreed upon, as to the value which the missing coal would have had at the time and place of delivery, if it had been delivered as agreed. There is no such element in the cases relied upon by plaintiff. Here it is agreed to and is one of the settled facts in the case, and is beyond controversy, that if the coal which was lost had not been lost, but had been delivered to plaintiff with the other coal in the car, its value in such car at destination in plaintiff's yard would have been $5.75 per ton. This value so agreed upon must be understood to be the true value in the car at the time and place in question for any and all uses to which the coal might be put.

If plaintiff had received the coal in question, he would have had in his possession a commodity which all agree was of the value of $5.75 per ton. If he had it not, he obviously, so it may be urged, sustained a loss in that amount per ton on account of that which had been lost. The carload of coal, when it reached plaintiff's yard, was worth that much less than it would have been if none had been lost. We are enabled to determine the amount in this particular case, because here we have the unusual experience of being provided with data showing value at the immediate time and place of delivery. If the car had been delivered intact, the coal therein would have been worth $255.0125. As actually delivered, with the lost coal out, it was worth $239.20. This is all agreed to. There is no cavil about it. The difference of $15.8125 would ordinarily be regarded as the loss which plaintiff must have sustained. This would be stopping at the first step, without inquiry into later conditions which might arise or

develop, and without considering whether the coal was to be sold at wholesale, or at retail, or was to be consumed by the consignee.

7. Notwithstanding the foregoing considerations, it is urged by plaintiff that even in such a case as this, where we know the value of the coal at destination, the plaintiff is entitled to recover, not that value, but a considerably greater amount, represented by the retail selling price of such coal at such place. The reasons assigned are:

a. That if plaintiff had received the coal according to agreement, he could have sold it at the retail price; and

b. That if plaintiff had wished to replace the missing commodity, he would have been obliged to pay the retail price at destination for the coal which he would purchase.

These reasons may be considered in their order.

(a) The value per ton in the car, $5.75, allows plaintiff an advance of $.25 per ton over the mine price. Some, or all of this is profit. That is included in the proximate loss which the plaintiff sustained through non-delivery. In this respect the case is similar to Chi. M. & St. P. Ry. Co. vs. McCaull-Dinsmore Co., 253 U. S. 97, where the advance was somewhat over $200 on an entire carload of wheat which was lost. No retail prices were involved in the McCaull-Dinsmore case. The spread between this value of the coal in the car, and the retail price thereof, all at destination, is $3.95 per ton. But a large part of this is absorbed in the operation of retailing. The coal must first be unloaded from the car. It must then be sold to some customer. It must next be reloaded into trucks or wagons, and then transported perhaps several miles to the place of business or home of the consumer, and there delivered to him. The stipulation of facts is to the effect that it is only after all this has been done that the $9.70 per ton can be realized. Along therewith there has been the overhead expense, the insurance, the making of collections, the risk of and allowance for bad debts, and the directing services of the plaintiff himself. We know that the aggregate of these items amounts to a considerable sum per ton. The plaintiff has not advised us thereof in detail. To get his $3.95 per ton, he is obliged to pay out a good part thereof in the course of the retailing operation, and besides must render or provide proper supervision as well. We do not know the amount of the net profit. It must be a rather modest sum. In any event, such profit, no doubt, bears some proper relation to

the original cost of the coal and to the risks which are assumed and the expenses which are incurred and the considerable service which is rendered in connection with the retail trade. The $3.95 per ton is the sum of legitimate and necessary additions to the carload price, which must be made in
31 connection with the retail operations in order that those operations may be successfully carried on. All this, however, is remote from the time, place and circumstances which should determine the amount of plaintiff's proximate loss. By the decision in this case we are awarding plaintiff $3.95 per ton over the carload price. This is much better for him than to have received the coal. He gets the full retail price without any risk or expense and without the work of any retail operations whatever. Had he received the coal, it is hardly possible that he could have realized net thereon, above cost and above the necessary expense of the retail operations, more than from $1.00 to $1.25 per ton. As to the figures, this is in part speculation, but necessary speculation, in as much as accurate information has not been adduced by the contending parties, but no matter what the precise figures may be, the conclusion must be the same,—that looked at from the standpoint now under consideration, the award is substantially in excess of any legitimate loss which the plaintiff has sustained. In the face of many authorities against the allowance of profits in such cases, it is barely possible that net profits at retail might be allowed here, but that would be in violation of the rule limiting the recovery in such cases to damages for the proximate loss, and in any event, we have no definite information as to what the profits would have been. It is quite clear that the considerable amount per ton necessarily expended in carrying on the retail operations could not, upon any legitimate theory, be included in the recovery here.

In 4 Sutherland on Damages, 4th Ed. Sec. 1098, p. 4178, the rule said to be applicable in such cases, and which is frequently quoted by the authorities, is stated as follows: "The retail price of property held for sale is not the standard by which its value is to be determined. Where a quantity of merchandise is sued for, the retail price would be unjust, for the merchant in fixing that price takes into consideration, not only the first cost of the goods, but store rent, clerk hire, insurance and probable amount of bad debts, and adds to all these a percentage of profit. This must be understood of a considerable quantity, not of a single article."

In theory of law, and presumably as a matter of fact, it was as advantageous to plaintiff to sell this coal at $5.75

per ton in the car, as it would have been to sell the same coal at $9.70 per ton at retail. The former price allowed a reasonable advance over the mine price, considering the risks assumed and the service required in connection therewith; the latter allowed a reasonable advance, we may assume, over the cost of the coal and the necessary risks, expense and service in connection with the retail operations. Looking forward to selling the coal at retail, or to making any other use thereof, it was worth in the car the sum of $5.75 per ton and no more. After the lapse of some period of time and under changed conditions, and after the expenditure of considerable effort and the incurring of considerable expense, plaintiff might have sold the coal for the gross sum of $9.70 per ton. Does that fairly measure his proximate loss on account of the non-delivery thereof?

32 (b) Another reason assigned for recovery here on the basis of the retail price per ton, is that if plaintiff would have been obliged to pay the retail price therefor. Inferentially it is assumed in such claim that plaintiffs have the right in all such cases to go into the market and buy at retail for the purpose indicated. Such statements of the rule has crept into the law and has been given a somewhat general application, because in some of the earlier cases and in various other cases since, the circumstances have been such that the claimant had the right to go into the market and replace the commodity which had been lost. This was sometimes in the wholesale market, and sometimes in the retail market, depending upon the character and amount of the goods which had been lost.

In determining the amount of damages in any case where general damages only are claimed, it is the proximate loss with which we are concerned. In all such cases the carrier is bound to pay the value of the goods as such value would have been at the precise time and place of delivery, under conditions there contemplated, if the delivery had been made as agreed. If we have means agreed upon for the ascertainment of that value, as we have here, without resorting to retail prices, then we are not specifically concerned with the latter. The value in the car and the cost of replacement might be two very different things. If we were dealing with carloads of wheat, or cotton, or flour, or lumber, or coal, such value and the cost of replacement would be the same. In such cases courts have sometimes said that the consignee is entitled to recover such sum as would enable him to go into the market and replace that which had been lost. That happened to be true with respect to carload lots, only as the

result of a coincidence. Such are ordinarily cases without special damages, and the ordinary rules apply. The consignee in such cases is entitled to recover the amount of his proximate loss. But in such cases the value per unit of the carload which has been lost is the same as the value per unit of another carload of the same commodity at the same place; the proximate loss and the cost of replacement are the same; and so the statements of the courts above referred to, though literally correct, are misleading if given a more extended application. The statements are true as to that particular class of cases.

There are other classes of cases where such general statements are made by the courts and are then lifted bodily, as it were, and given a broader and inaccurate application elsewhere. We are here concerned with and are speaking of the typical case of general damages,—such as follow naturally and in the usual course of things from the breach, and with values at the precise time and place when and where delivery should have been made,—not at some other time or place. By way of contrast and illustration it is not wholly improper to refer to some of these other classes and to the statements of the court made in reference thereto. In this connection there are the unusual cases of various kinds where under special circumstances, on failure to deliver, the consignee is under some reasonable compulsion to go into the market and purchase at retail. In all such cases his actual loss is measured by the amount he is required to pay. This may occur with reference to many articles or commodities which may be necessary for the daily requirements of
33 the consignee in his private life, or in his occupation or business, and where, if goods purchased do not arrive, he must go into the market and supply them otherwise; or it may be a case where he has already sold the commodity in advance and where he must go into the market to purchase that with which to make up the exact amount which he has lost. All these, however, are usually cases of special damages which require special pleading, and, properly, should be dealt with along those lines, although this point is not always made. Vanderbilt vs. Ocean S. S. Co., 215 Fed. 886,890. Here again, courts may make the general statement that in case of loss in transit the consignee is entitled to recover such sum as will enable him to go into the local market and replace the commodity by a purchase at retail. Such statement, made in general terms, may be correct as applied to the particular case there in hand, but, it may be urged, is incorrect when extended to a case where general

damages only are involved. It will be observed, however, that in all these cases of special damages the consignee obtains no advantage and realizes no profits on the transaction; and the defendant is not mulcted in damages, arbitrarily or unnecessarily, but is required to pay such an amount only as will make the plaintiff whole.

Again, there are the cases where general damages only have been sustained, but where there is difficulty in fixing values as of the time and place of delivery. In such cases it is sometimes necessary to resort to values at the time and place of shipment and therefrom, as nearly as may be, to estimate the value at destination. Northern Commercial Co. vs. Lindblom, 162 Fed. 250, 255. The Arctic Bird, 109 Fed. 167, 175. Sometimes it is necessary to resort to retail prices at destination and therefrom, as nearly as may be, to estimate values in bulk or otherwise at that place. And sometimes, in cases involving single articles, or under unusual circumstances, the retail price at destination is the substantially correct measure of value of the lost article or articles at that place. The question of value at destination is always a question of fact, and it must be determined as other questions of fact are determined, upon the best evidence available for that punrpose. In such cases again, courts sometimes make general statements which give trouble when applied in other cases. It is clear, however, that in cases where the value at destination is agreed upon and is a settled fact, the troubles respecting these matters of evidence do not obtrude.

There was no necessity, occasion or advantage here for the plaintiff to go into the local market for the purpose of purchasing coal with which to replace that which had been lost. There is strong ground for urging that a consignee of commodities in case of their loss in transit has no absolute or universal right to go into the local market at the point of destination and purchase goods at retail, with which to replace that which has been lost. He may do this only to the extent which may be reasonably necessary to protect his rights,—not the sentimental right of having a thing at all hazards, because he has bargained for it, and this without regard to the rights of others, but his substantial rights and interests. He should not be permitted to purchase
34 at retail when this places an excessive burden on others and does himself no good. He may not insist on this one burdensome method of adjustment, when other methods, quite as favorable to himself, and less harsh to

others, are equally available. He should not be permitted to mulct the carrier in an amount in excess of what he has actually suffered. To do so would work an evident injustice. The carrier has some rights, as well as the consignee.

In cases such as this, involving the loss of part of a shipment of a considerable quantity, all to be resold, (and these features are mentioned, not to create a separate class, but because a case of this character serves well as an illustration and covers the case at bar), and where general damages only are involved, it may fairly be said, from what we know of human conduct, not only that the consignee is not obliged to go into the local market and buy, but, more than this, that he never does such a thing, does not wish to make any such purchase, and will not do so unless under some form of compulsion. Moreover, if in this case plaintiff had purchased at retail and had paid $9.70 per ton and had placed his coal in the car to take the place of that which had been lost, the coal so purchased at retail would have been worth $5.75 per ton in the car, and no more. If we compel defendant to reimburse plaintiff on account of the supposed new purchases, we require it to pay $9.70, so that plaintiff may have $5.75. Again, by establishing the rule prayed for by plaintiff, we make assurance doubly sure that under the circumstances here involved, no consignee will ever make a purchase at retail. Such an award as he asks, places him at a substantial advantage over the position in which he would be if he should go into the market and buy. If he should actually buy, he would then have the coal on his hands and would be obliged to sell the same again, either at wholesale, or at retail. If he should sell at wholesale, he would receive $5.75 per ton for the coal. If he should sell at retail and should succeed in making collections he would finally realize the comparatively small amount of profit which the retail business affords; but we are giving him a sure net profit of $3.95 at the outset above the value of the coal in the car, and are relieving him of all care, annoyance, expense and risk of the retail trade in connection therewith. No one would be so stupid as to buy and handle the coal under such circumstances. We have a sure guaranty that he would not. He would keep the money.

8. The stipulation of facts states that all sales of coal of the character here in question, of less than 60,000 pounds, in the local market at the time and place in question, were considered sales at retail. It is further stipulated that the retail market price of 5,500 pounds of such coal at such time

and place was $9.70 per ton. The stipulation does not specify the retail price of quantities of such coal weighing more than 5,500 pounds and less than 60,000 pounds. Drawing upon the current fund of general information for purposes of illustration, we may readily conclude that the retail price holds good for all quantities sold at retail. It is common knowledge that this is so, or that the variation is very slight. A man who buys 5,500 pounds or 2¾ tons of coal, at retail, pays the same price per ton as the man who
35 buys 55,000 pounds, or 27½ tons. As already indicated, the value of the entire carload of coal delivered in plaintiff's yard in Minneapolis, if none had been lost, would have been $255.0125. If all had been lost, the recovery would have been limited to that sum. Under the rule which is being applied in this case, if the weight of the coal which was lost had amounted to 55,000 pounds, plaintiff would be entitled to recover the sum of $266.75, on account of such loss,—an amount substantially greater than he could have recovered if the entire carload had been lost; and in addition thereto he would have on hand that part of the coal which was not lost, amounting to 33,700 pounds. Can this be a correct application of a correct rule?

9. Again, if we assume that the carload of coal in question had been purchased by a wholesale dealer, where does the rule contended for by plaintiff lead us? Confessedly, such wholesaler purchased the entire lot for the purpose of selling again at wholesale. Confessedly, the coal and each ton thereof, in the car would have been worth $5.75. It would sell for that and no more. That is the price which the wholesaler would ask for it and which he would expect to obtain for it, and the price which afterward he would realize therefor, when a sale should be made. The 5,500 pounds of coal is missing. If it had been in the car it would have been worth the same amount per ton as the other coal there, and would have sold for the same price. Under such circumstances is it possible that the wholesaler would have a right arbitrarily to say to the carrier: "I want that coal. It is worth only $5.75 per ton to me. I do not need the coal itself for any purpose. If I receive $5.75 in money for each ton thereof, I would be as well off as if I had the coal; but I want the coal and you must pay me $9.70 per ton for it, because that is the amount I must pay in the local market for other coal to replace that which has been lost." Or might the wholesale dealer in such case go a great deal further, as the plaintiff does in the case at bar, and say: "You

have lost my 5,500 pounds of coal. I do not want it, or need it. I am not going to try to replace it. If I had it here in the car it would be worth only $5.75 per ton. That is my proximate loss. I could not sell it there for more than that amount. I am selling the remainder of the carload at that price. My only loss measured in money is the loss of the value of that coal in the car. But I demand that you pay me for the missing coal the price which I would have to pay for it at retail, if I desired or was obliged to replace it. That is $9.70 per ton." If such a claim should be allowed the wholesaler would be making money fast on lost coal. He would always wish for generous losses on all shipments to him. Admitting that the coal was worth only $5.75 per ton in the car and that if the missing coal had been there, he would have sold it at that price, he is nevertheless demanding $9.70 per ton therefor. It would seem quite improbable that the wholesale dealer would be allowed to successfully make such a claim. Quite clearly he would have to be content with $5.75 per ton. The coal of a retailer in a car, however, is worth no more than the same coal would be worth if owned by a wholesale dealer, and in case of the non-delivery of any part thereof, the loss would be precisely the same. There cannot be one measure of damages for the one dealer and another measure for the other.

36 Again, in testing the general accuracy of the decision here, the following considerations are not without some bearing: The carload of coal as delivered, with the missing coal out, was worth $239.20. If the carload had been intact, it would have been worth $255.0125. If instead of any coal having been lost, the carload of coal had been damaged so that when delivered it was worth only $239.20, then under all the authorities, the amount of recovery would be the difference between the value as actually delivered, and its value as it should have been if delivery had been as agreed. United S. S. Co. vs. Haskins, 181 Fed. 962, 965, Magdeberg, etc. vs. Paulson, 29 Fed. 530, 532-3. Such difference and the amount of such recovery would be $15.8125. But here, where the real loss is confessedly the same, we allow a recovery of $26.675. Or, stated otherwise, if two cars had been shipped, one to each of two separate dealers at the same destination, and if the coal in one car had been damaged in transit, so that on delivery, the carload was worth only $239.20, where it should have been worth $255-.0125, and if from the other car certain coal had been lost in transit, so that such carload when delivered was worth also $239.20, when it should have been worth $255.0125, we

would be allowing a recovery of $15.8125 in one case, and of $26.675 in the other.

10. From the foregoing it is reasonably clear that there is much confusion in the cases, and in the statement of the rules, and in their application to situations which are widely different. It is apparent that distinctions which go well nigh to the root of the matter are sometimes overlooked. These distinctions seem to be vaguely in mind in some instances, where right conclusions are reached, without stating correctly the underlying reasons therefor. We speak of pleading special damages, and of values at the time and place of delivery, and of retail prices, and of profits, and of the right to go into the market and buy, and of the risk, cost and service in connection with retail operations, and of the price at which the commodity in question will sell in the local market. These matters are discussed indiscriminately in all kinds of cases where commodities have been lost in transit.

A distinction between the rule applicable to the loss of a separate article and that applicable to the loss of a larger quantity of merchandise, and especially when the latter is held for resale, is suggested in the quotation from Sutherland on Damages, supra. There is grave doubt whether there is any satisfactory reason, operating uniformly and in all cases, which will support such distinction. Whether the commodity lost was large in quantity, or was a single article; whether the consignee intended to effect a sale at wholesale, or at retail, or intended not to sell at all; whether the commodity was new or secondhand, are all questions of a strictly subordinate character. The one question which is the same in all cases where general damages only are involved, is the value of the lost commodity as that value would have been at the time and place of delivery under the conditions there contemplated, if delivery had been made as agreed. The apparent difficulty with different cases, and in the application of the rules thereto, is often in the evidence necessary and in the application thereof. It often occurs that the value of a large quantity of any commodity is not
37 the same as the retail price at which such commodity is being sold in the local market. It is not always so easy to prove the value of a single article at a given point without inquiring into the prices there prevailing at retail; but if the value of a separate article at a given point is

shown to be different from the retail price of such article in the local market, such article then takes the same course as the commodity in large quantity and is dealt with the same; and it should be clearly understood that the only legitimate purpose of consulting local retail prices in any such case is for the light, if any, direct or indirect, which a knowledge of such prices may shed upon the ultimate questions of value above referred to. It is a course of procedure, not at all controlling, but advisory, which is employed in determining that value. No recognition is involved of any arbitrary right on the part of the claimant in such cases to go into the local retail market under any and all circumstances, and there make an actual purchase.

11. If the foregoing observations be deemed mainly or largely incorrect, or inconclusive, they will be disregarded. If, in the main, they shall be found to be correct, it may perhaps be considered, with reference to the first two classes hereinbefore referred to, in the first of which falls the case at bar, that the rules applicable thereto should be as next hereinafter set forth, with such variations therein as may seem proper.

a. In the usual or ordinary case involving general damages only, where the commodities have been lost in transit and where the loss thereby sustained is such only as follows naturally or in the usual course from such loss:

Under such circumstances the single question is the amount of the proximate loss which has been sustained, and this in turn means what would the lost commodity have been worth in money at the precise time and place and under the conditions of the contemplated delivery, if delivery had been made as agreed.

If, by admission, or otherwise, on all the evidence, it is established that at such time and place the true value of the lost commodity was other than and different from the price at which such commodity was being bought and sold at retail in the local market, then such established value will be the measure of recovery; and the retail price will not prevail as a measure of recovery merely because that is the amount for which the plaintiff might have been able to sell the missing commodity at retail, or because, if he wished to replace the same, he would have been obliged to pay such retail price for the commodity with which to make such replacement.

If on the other hand, in such a case, either from absence or insufficiency of evidence, it is not satisfactorily establish-

ed that the true value of the missing commodity, at the time and place of delivery, would have been an amount other than and different from the retail price thereof in the local market, then evidence of such retail price may be of greater weight and importance; and where it is sufficiently persuasive of the true value, it may be accepted as indicating
38 the proper measure of recovery. It is the value on the spot as that value would have been if the commodity had been delivered as agreed, with which we are concerned. That measures the proximate loss sustained by the consignee. It may, in certain cases, be the same as the retail price.

b. In the unusual case involving special damages, where the commodities have been lost in transit, and where by reason of special circumstances, the consignee has been under some reasonable compulsion to go into the local market and supply himself with the commodities which have been lost:

In cases under this head the consignee must pay the going price. If the goods which were lost consisted of carload lots, he then pays the price at which such quantities may be obtained. If the amount which he must have is obtainable at retail only, he must pay the retail price. Under such circumstances he must pay a certain amount to cover the cost of selling goods at retail and he must pay the retailer's profit. in justice to the carrier he should purchase at the lowest price at which the commodity is reasonably available. There is no question about the rule under such conditions. If the consignee pleads and proves the special circumstances, and that he was under reasonable compulsion to go into the local market and purchase either at wholesale or retail, and that such consequences were in the contemplation of the carrier and himself when the shipment was made, he may recover the amount which he was compelled to pay.

There are other cases involving the loss of commodities in transit which wall outside any of the foregoing classes. Such cases are comparatively few in number and usually are of minor importance, although this may be otherwise. There is the case of the loss of goods purchased for a seasonal market, by a retailer, under circumstances such that they cannot be replaced in time to meet the trade. Examples of this are certain classes of women's wear which are sold at a particular time of the year, and toys purchased for the Christmas trade. In such cases the merchant loses the season's sale of such goods and the profits which would have ac-

crued thereon. Under such circumstances the questions of what the goods could be bought for at destination, or what they would have been worth on the spot where they should have been delivered, are not important. The only questions are what they would have sold for at retail, and what the net profits would have been thereon. In such special cases the merchant is usually allowed such net profits on the anticipated sales. That would be his actual loss.

Again, there is the loss of machinery, or parts thereof necessary in carrying on industrial or mechanical operations, where the effect of such loss is to suspend such operations and causes inconvenience and loss. If such consequences were in contemplation of the parties, a recovery may be had on account thereof.

There are also cases, where a single article of value is lost in transit, or where partially used household goods, or wearing apparel, or mechanical equipment are lost, and where there is no standard of value applicable thereto, except the current prices at retail. In such cases those prices
39 are sometimes allowed to control as being the best evidence obtainable, or they are used as a standard from which deductions may be made. Such cases, however, often fall within the class where the consignee is under the reasonable compulsion of going into the market and replacing the lost commodity by purchase at retail. The real reason for allowing a recovery on the basis of the retail price, therefore, is sometimes not celar.

These latter classes are all special in their nature and special rules for estimating the amount of the damages are applied.

12. Aside from the few citations hereinbefore made, the authorities generally applicable in this case are referred to in the two aforementioned opinions therein. There is no differenec of opinion between the parties as to the rule for determining the amount of plaintiff's damage,—the value at the time and place delivery should have been made. The sole dispute arises over our resort to retail prices in determining that value when the value already has been agreed on before and without such reference.

Various cases are cited where, in a general way, and for one reason or another, the courts say that in the particular case there in hand, the plaintiff should recover such amount as would enable him to enter the local market and replace

that which had been lost. Generally there is no quarrel with such cases. More common still is the general statement that plaintiff is entitled to recover the value or market value of the commodity lost at the place of destination.

13. At the time this case was first decided the one case, which, arguendo, most strongly and directly supported plaintiff's claims was Heidritter Lbr. Co. vs. Central R. Co. (N. J.) 122 Atl. 691, 692. Since then, to the same effect, has been decided the case of Leominster Fuel Co. vs. New York, N. H. & H. H. R. Co. (Mass.) 154 N. E. 831. The latter case rests on the authority of the Heidritter case, and the decision by the Court of Appeals in the case at bar. In both the Heidritter case and the Leominster case, the most distinguishing and controlling feature of the case at bar was entirely absent. Reference is now made to the value, established by agreement of the parties, which the coal in question would have had in car at destination if delivery had been made as agreed. This feature was not sufficiently stressed by this court in its earlier opinion.

In the Heidritter case it was said that "the real question at issue is whether the plaintiff was entitled to recover the retail value at destination, rather than the wholesale value at the point at shipment." p. 691. In the Leominster case the alternative allowed by the evidence was the cost of the coal at the mine, plus freight, which defendant claimed was the true basis of recovery, and the retail price of such coal at the yards of dealers, or such price delivered in plaintiff's yard. Plaintiff claimed a recovery on the latter basis and such claim was allowed. In both cases it was held, in effect, that the plaintiff should recover on the theory that he had a right to go into the local market and replace the lost commodity by purchase at retail, which theory, for the reasons hereinbefore set forth should not be conceded. It will be observed that each of these two cases are within a much narrower compass than the case at bar.

We are dealing here with a commodity which has two well recognized values or prices in the same market: One is the value or price at wholesale, when we are dealing with lots of 60,000 pounds or over; the other the value at the end and of after a considerable amount of service and expense and risk, which we call the value or price at retail. The loss here is part of a wholesale shipment. Shall we apply the retail price in determining the loss or damage sustained? It is believed that aside from the decisions by the Court of Appeals,

the two cases above cited are the authorities which tend most directly to support plaintiff's views. Aside from the Heidritter case, the authorities cited in the decision of the Court of Appeals in support thereof, in the main, are content with announcing the general rule. The Yazoo case therein cited will be later referred to. The case of Cutting et al vs. Grand Trunk Ry. Co., 13 Allen, 381, also cited, was a case of replevin for a quantity of flour which the defendant had refused to deliver until certain charges thereon claimed by defendant should be paid. The court states the rule for the measure of damages in cases such as this, pp. 384, 385, and in connection with the discussion as to the measure of damages where there has been a delay in the delivery of goods, and a fall in the market value meantime, makes the statement quoted in the decision of the Court of Appeals herein. That excerpt and the decision throughout rests on the general statement of the value, or the market value of the goods at destination. The discussion goes no further. Profits are disallowed, p. 386, and at p. 387, it is said: "Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods." The general effect of this would be to hold plaintiff here to the value in the car. We, however, are asked to go much further than the allowance of profits. We are asked to allow and pay plaintiff for expenditures which he does not make, and for services which he does not render, and for risks which he does not take.

14. In opposition to the claims of plaintiff are a considerable number of cases which decline to adopt the retail market value as the measure of damages in cases such as this. They do not all employ the same reasoning, nor reach precisely the same results, but are all agreed in rejecting the retail price standard.

Brown Coal Co., vs. Illinois Central R. Co., 196, Iowa, 562, is a carefully considered case. If the foregoing views are correct, the court there should have allowed a recovery based on the value of the coal in the car at destination. There is some ground for urging, however, that there is no clear evidence of such value.

Yazoo & M. V. R. Co. vs. Delta Grocery & Cotton Co. (Miss.) 98 So. 777, was an action to recover the value of certain flour lost or damaged in transit. It is there
41 stated that "the exact point in controversy is whether the appellee, a wholesale grocer, is entitled to recover
* * * the invoice or cost price, plus freight," of the damaged

flour, "or the resale value, (that is the price at which the flour could have been sold, or, as we will say, the reasonable cash market value) at the point of destination." p. 777. • • • "The damaged flour cost plaintiff $10.44 per barrel delivered at Clarksdale. Plaintiff recovered $11.30 per barrel for the damaged flour, which represents what plaintiff could have sold the flour for, or its reasonable wholesale cash market value at the point of destination." This wholesale cash market value is what defendant contends for here as the proper measure of recovery.

H. T. Cottam & Co. Inc. vs. Illinois Central R. Co., 3 La. Court of Appeal Reports, 240, was decided in October, 1925. The case was presented in such a way that contemplated profits occupied an important place in the case. These were disallowed and plaintiff held to the original cost of the merchandise, plus freight.

In Central Georgia R. Co. vs. American Coal Co. 28 Ga. App. 95, certain coal was lost in transit from a carload shipment. Plaintiff was limited in its recovery to the wholesale price at point of destination.

For further cases which decline to adopt the local retail price as the measure of damages in such cases, see the following authorities:

Chicago, R. I. & P. R. Co. vs. Broe, 16 Okla. 25.

Texas & Pac. R. Co. vs. Payne, 15 Tex. Giv. App. 58.
State vs. Smith, 31 Mo. 566.

Cincinnatti N. O. & T. P. R. Co., vs. Hansford, 125 Ky. 37. In this case the evidence showed that the lost goods cost $317. and that if they had been received and sold at retail, a profit of $105.66 would have been realized thereon. There was no evidence as to what their value would have been at destination, or that it would have been more than the cost price. On that ground, as stated in the opinion, a recovery was limited to $317. and the prices at retail were disregarded.

Quanah A & P. Co. v. Novit (Tex. Civ. App.) 199 S. W. 496.

15. For the reasons stated near the beginning of this opinion judgment will be entered allowing plaintiff a recovery at the rate of $9.70 per ton for the coal which was lost.

Dated September 23, 1927.

WM. A. CANT,
U. S. District Judge.

(Endorsed): Filed Sept. 23, 1927, Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

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42 Petition for Writ of Error

To the Hon. William A. Cant, Judge of the District Court aforesaid:

Now comes Illinois Central Railroad Company, a corporation, the defendant in the above entitled action, and states that on the 23rd day of September, 1927, the above named Court entered a judgment in said cause in favor of the plaintiff and against the defendant for Thirty Four and 58/100 ($34.58) Dollars, and costs, in which judgment and proceedings had therein in this cause certain errors were committed to the prejudice of this defendant, which errors will more in detail appear from the Assignments of Error herewith annexed and filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in its behalf, returnable to United States Circuit Court of Appeals, Eighth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals, and that the judgment aforesaid be there reversed.

Dated at Minneapolis, Minnesota, this 22nd day of October, 1927.

EDWARD C. CRAIG
Edward C. Craig,
Chicago, Illinois.

GUESMER, CARSON,
BROWN & LOUGHIN,
Guesmer, Carson, Brown &
Loughin,

EDWIN C. BROWN,
Edwin C. Brown,
1000 Met. Life Bldg.
Minneapolis, Minn.
Attorneys for Defendant.

(Endorsed) Filed Oct. 22, 1927, Joel M. Dickey, Clerk, by Thomas H. Howard. Deputy.

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43 Assignments of Error

Now comes Illinois Central Railrod Company, a corporation, the defendant in the above entitled cause, and in connection with its petition for writ of error in this cause assigns the following errors defendant avers occurred in the entry of judgment in said cause and in the proceedings prior thereto, and upon which it relies to reverse the judgment entered herein.

That the District Court erred:

I.

In finding and adjudging that the revised stipulation of facts, dated September 27, 1926, did not materially differ from the stipulation of facts, dated April 6, 1923, on the former trial and before the Circuit Court of Appeals, which said finding is expressed in and by the Court's order for judgment herein and in and by the following portion of its memorandum, made a part of said order, that

"This court is not satisfied that the amended stipulation of facts justifies the conclusion that the case has been substantially changed,"

in that the revised stipulation shows the following facts not shown by the original stipulation, to wit:

1. That plaintiff, during all the times in question in the case, "has conducted his said business in all respects in a manner substantially similar to the manner in which other similar fuel businesses in Minneapolis aforesaid were then conducted". (I b of the revised stipulation of facts).

2. That by the terms of the transportation contract between the parties, the place for delivery of the car of coal in question was "on the said industry track at the plaintiff's coal yard at Minneapolis, Minnesota" (I c, and III b
44 and c), and not at plaintiff's yard at Minneapolis, Minnesota, and that "Defendant's services in the transportation of the coal in this case ended in the delivery of the car containing the coal upon the said industry track." (VIII).

3. That the subject matter of the transportation contract between the parties was a carload or wholesale quantity of coal, and that the quantity of coal delivered by the defendand to plaintiff was likewise a carload or a wholesale quantity of coal; the terms "carload" and "wholesale" quantities of coal are defined in the revised stipulation. (III a, and IV a).

4. That the coal which defendant failed to deliver was, in the contemplation of the parties, a "portion of a carload" as such, and not a "retail" quanity as such. (III c, and V a).

5. That the unloading of the coal from the car was to be done by the plaintiff (V b and c), and the unloading of the coal "and the further handling of the same for sale or delivery in less than carload lots was at the expense of the plaintiff" (VIII), and that the agreed destination market value of the coal which was the subject of this shipment, in the car at the time and place of delivery or at the time when and the place where delivery should have been made by defendant, was $5.57 and no more per ton. (V c).

6. That "at and prior to the time of delivery of said shipment less than carload lots of coal had not been sold in said market and delivered to or into any car on track as aforesaid" (V d), and that at and prior to the time of delivery of this shipment it was not customary for plaintiff or any other dealer to replace less than carload losses by purchasing the lost quantity of coal. (VIII).

7. That at and prior to the time of delivery herein, it was the ordinary and customary practice for "other fuel dealers" at Minneapolis, as well as for plaintiff, to maintain their stocks of coal exclusively by making later purchases of coal in carload lots in the regular and customary course of business, and not by the purchase of coal, at destination or
45 otherwise, in less than carload quantities. (VIII).

8. That plaintiff did not at any time purchase any coal for the purpose of replacing any coal lost from this shipment, "except the purchase in carload lots to maintain his stock or said Southern Illinois No. 2 nut soft coal, of that kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine in the regular and customary course of his business". (VIII).

9. That the coal delivered by defendant was "added to the general stock of coal of the plaintiff at Minneapolis, aforesaid, and had this 5500 lbs. of coal been contained in this car it would have been added to the general stock of coal of the plaintiff at Minneapolis, aforesaid," and that "the failure to receive the 5500 lbs. of coal aforesaid in no way interfered with the maintaining by the plaintiff of his ordinary and usual stock of coal" (VIII).

II.

In finding, as one of the material facts in the case, contrary to defendant's objections to admissibility on the ground that

said evidence and facts were immaterial and irrelevant to any issue in the case, that:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price (of $5.50 per ton f. o. b. shipping point)." (Paragraph 5 of Findings of Fact).

III.

In finding, as one of the material facts in the case, contrary to defendant's objections to admissibility on the ground that said evidence and facts were immaterial and irrelevant to any issue in the case, that:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price (of $5.75 per ton)". (Paragraph 6 of Findings of Fact).

IV.

In finding, as one of the material facts in the case, con-
46 trary to defendant's objections to admissibility on the ground that said evidence and facts were immaterial and irrelevant to any issue in the case, that:

"That on or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable and average market value and price of coal such as that here involved, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5,500 pounds, was $13. per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less than said amount." (Paragraph 7 of Findings of Fact).

V.

In denying, in and by its order for judgment herein, defendant's motion for an order striking from the record as immaterial and irrelevant to any issue in the case the following portion of paragraph (b) of V of the stipulation of facts:

"Quantities of less than carloads were not obtainable in said market at said time and place at said price."

VI.

In denying, in and by its order for judgment herein, defendant's motion for an order striking from the record as immaterial and irrelevant to any issue in the case the following portion of paragraph (c) of V of the stipulation of facts:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price."

VII.

In denying, in and by its order for judgment herein, defendant's motion for an order striking from the record as immaterial and irrelevant to any issue in the case the following portion of paragraph (d) of V of the stipulation of facts:

"On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less."

47

VIII.

In denying, in and by its order for judgment herein, defendant's motion for judgment in favor of plaintiff and against the defendant for the sum of $15.82, and interest and costs to October 29, 1926, the date of said motion, as the value of the coal not delivered by defendant, based and computed on the agreed carload market value of the coal at Minneapolis on the date of delivery, $5.75 per ton.

IX.

In denying in and by its order for judgment herein, defendant's motion for judgment in favor of plaintiff and against the defendant for the sum of $15.82, and interest and costs, based upon the destination value of coal not delivered, $5.75 per ton, expressly agreed to by the parties in and by the following paragraph V (c) of the stipulation of facts, as the fair, reasonable value, at the time and place of delivery, of the coal not delivered by defendant:

"On or about October 17, 1922, the fair, reasonable and average market value and price at Minneapolis, Minnesota, of carload lots of Southern Illinois No. 2 nut soft coal on track at Minneapolis, as aforesaid, including the said industry track, was $5.75 per ton, plus freight, where the purchaser paid the freight, received the shipment on track, and himself unloaded the shipment as was done by the plaintiff in this case."

X.

In holding and adjudging, in disregard of the express agreement of the parties that the fair, reasonable value of the

coal at the time and place of delivery was $5.75 per ton, as expressed in paragraph V (c) of their stipulation of facts herein, that the coal not delivered by defendant was worth, and that plaintiff's damages suffered by the non-delivery by defendant amounted to, more than the agreed value, $5.75 per ton, of the coal not delivered.

48 XI.

In holding and adjudging that the amount of plaintiff's full actual loss and damages, suffered as the proximate result of defendant's breach of contract under the facts in evidence in this case, should be measured and computed at the rate of $9.75 per ton, instead of at the rate of $5.75 per ton, for the coal not delivered.

Wherefore, defendant prays that the judgment of said District Court be reserved.

EDWARD C. CRAIG
Edward C. Craig,
Chicago, Illinois.

GUESMER, CARSON, BROWN & GUESMER
Guesmer, Carson, Brown & Loughin,

EDWIN C. BROWN
Edwin C. Brown,
1000 Met. Life Bldg., Minneapolis, Minnesota.
Attorneys for Defendant.

(Endorsed). Filed Oct. 22, 1927. Joel M. Dickey, Clerk, By Thomas H. Howard, Deputy.

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49 Waiver of Bond on Writ of Error.

G. I. Crail, the plaintiff above named, through his undersigned attorney, Stanley B. Houck, hereby waives any bond or undertaking on the part of the defendant, whether for costs or damages or for any other purpose, in connection with defendant's petition directed to the Court above named for a writ of error returnable to the United States Circuit Court of Appeals, Eighth Circuit, for the correction of the errors complained of in said petition and in the Assignments of Error annexed thereto, and hereby consents that the writ of error when issued may operate as a supersedeas and stay of execution on the judgment herein entered and as a stay of all proceedings herein except on the writ of error, with the same

force and effect as if bond on writ of error were filed and approved by said court.

Dated at Minneapolis, Minnesota, this 22nd day of October, 1927,

STANLEY B. HOUCK
Stanley B. Houck,
Attorney for Plaintiff.

(Endorsed) Filed Oct. 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

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50 Order Allowing Writ of Error.

Defendant in the above entitled action, having filed in this Court a petition praying that a writ of error issue, returnable to the Circuit Court of Appeals, Eighth Circuit, for reversal of the judgment heretofore entered herein by the above named United States District Court on the 23rd day of September, 1927, in favor of the plaintiff and against the defendant for the sum of Thirty Four and 58/100 ($34.58) Dollars, and costs; and defendant having also filed a waiver by plaintiff of any bond or undertaking, it is hereby

Ordered that the said petition be and the same hereby is granted and that a writ of error be and the same hereby is allowed and ordered issued as prayed for; and it is further

Ordered that the writ of error, in conjunction with plaintiff's said waiver of bond or undertaking, shall operate as a supersedeas and stay of execution on the judgment entered herein and as a stay of all proceedings herein except on the writ of error with the same force and effect as if bond on writ of error were filed and approved by this court.

Dated at Minneapolis, Minnesota, this 22nd day of October, 1927.

WM. A. CANT
United States District Judge.

(Endorsed) Filed Oct 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

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51 (Writ of Error and Clerk's Return.)

United States of America, ss.

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States, for the District of Minnesota, Fourth Division—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District

Court, before you, at the March Term, 1927, thereof, between G. I. Crail, doing business as P. McCoy Fuel Company, Plaintiff, and Illinois Central Railroad Company, Defendant, manifest error hath happened, to the great damage of the said defendant as by its complaint appears,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit of Appeals, for the Eighth Circuit, on or before the 21st day of December, 1927, to the end that the record and proceedings aforesaid, being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 22nd day of October, A. D. 1927.

Seal
U. S. Dist. Court
Fourth Div.
Dist. of Minn.

Issued at office in Minneapolis, Minnesota, with the seal of the District Court of the United States, for the District of Minnesota, Fourt Division.

JOEL M. DICKEY
Clerk of the District Court of the United States, for the District of Minnesota.
By Thomas H. Howard,
Deputy.

Allowed by William A. Cant, Judge.

United States of America,
District of Minnesota,
Fourth Division—ss.

In obedience to the command of the above writ, I herewith transmit to the United States Circuit Court of Appeals, for the Eighth Circuit, a duly certified transcript of the record

and proceedings in the within-entitled cause, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the Seal of the District Court of the United States for the District of Minnesota, Fourt Division.

Seal
U. S. Dist. Court
Fourth Div.
Dist. of Minn.

JOEL M. DICKEY
Clerk of the District Court of the United States, for the District of Minnesota.
By Thomas H. Howard,
Deputy.

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52 Citation and Admission of Service

United States District Court, District of Minnesota, Fourth Division.

G. I. Crail, doing business as P. McCoy Fuel Company,
Plaintiff,
vs.
Illinois Central Railroad Company, Defendant.

United States of America, to G. I. Crail—Greeting:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States District Court, District of Minnesota, Fourth Division, wherein you are plaintiff and Illinois Central Railroad Company is defendant, to show cause, if any there be, why the judgment rendered against the said defendant, as in said writ of error mentioned, should not be corrected, and why speedy jurisdiction should not be done to the parties in that behalf.

Witness, the Honorable William A. Cant, Judge of the United States District Court, this 22nd day of October, A. D., 1927.

WM. A. CANT
Judge of said Court.

Due and personal service of the foregoing Citation, by copy, at Minneapolis, Minnesota, is hereby admitted this 24th day of October, 1927.

STANLEY HOUCK
Attorney for Defendant in Error.

Filed in U. S. District Court on October 24, 1927.

53 Praecipe for Transcript

To the Clerk of the above named Court:

Please make return to the United States Circuit Court of Appeals, Eighth Circuit, upon the Writ of Error in the above entitled cause, and include in the transcript of record the judgment roll and the papers and documents listed in the Stipulation as to Printing Record filed herewith.

EDWARD C. CRAIG
GUESMER, CARSON, BROWN & LOUGHIN
EDWIN C. BROWN
Attorneys for Illinois Central Railroad Company, Defendant and Plaintiff in Error.

(Endorsed) Filed Oct. 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

---

54 Election as to Printing

The Defendant and Plaintiff in Error in the above entitled action hereby files in the office of the Clerk of said Court a notice of his election to take and file in the United States Circuit Court of Appeals for the Eighth Circuit, to be printed under the supervision of its Clerk, under the rules, a transcript of the record in said action.

EDWARD C. CRAIG
GUESMER, CARSON, BROWN & LOUGHIN
EDWIN C. BROWN
Attorneys for Illinois Central Railroad Company, Defendant and Plaintiff in Error.

(Endorsed) Filed Oct. 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

---

55 Stipulation as to Printing Record

It is hereby stipulated and agreed that the following named portions of the record herein and none other shall be printed for use on the hearing in the United States Circuit Court of Appeals, Eighth Circuit, on the writ of error herein, to-wit:

The complaint; answer; original stipulation of facts dated April 6, 1923; bill of exceptions; stipulation for approval of bill of exceptions; certificate of District Judge to bill of exceptions; findings of fact, conclusions of law, order for judgment, and memorandum of the District Court; judgment of the Court; petition for writ of error; assignments of error; waiver of bond on writ of error; order allowing writ of error, writ of error and Clerk's return; citation and admission of service; praecipe for transcript; election as to printing;
56 this stipulation and Clerk's certificate to transcript; and it is agreed that printing of the title may be omitted as to each of the above except as to the complaint.

And said parties hereby designate the above mentioned portions of said record as parts thereof which they deem necessary or material for the consideration of the errors assigned.

Dated this 24th day of October, A. D. 1927.

EDWARD C. CRAIG
GUESMER, CARSON, BROWN & LOUGHIN
EDWIN C. BROWN
Attorneys for Plaintiff in error.

STANLEY HOUCK
Attorney for Defendant in error.

(Endorsed) Filed Oct. 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

---

57 (Clerk's Certificate to Transcript.)

United States of America, District Court of the United States, District of Minnesota, Fourth Division.

I, Joel M. Dickey, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the following, consisting of 56 pages, numbered consecutively from

1 to 56, inclusive, is a true and complete transcript of the record and proceedings in said cause, wherein

G. I. Crail, doing business as P. McCoy Fuel Company, is plaintiff, and

Illinois Centrail Railroad Company is defendant, and of the whole thereof (except as modified by the praecipe of said defendant to be found at page 53 of said transcript) as appears from the original records and files of said Court; and I do hereby further certify and return that I have annexed to said transcript and included within said paging the original Citation, together with proof of service thereof.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at Minneapolis, in the District of Minnesota, this 25th day of October, A. D. 1927.

Seal
U. S. Dist. Court
Dist. of Minn.
Fourth Div.

JOEL M. DICKEY,
Clerk,
By Thomas H. Howard,
Deputy Clerk.

Filed Oct. 27, 1927. E. E. Koch, Clerk.

52 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Plaintiff in Error.)

United States Circuit Court of Appeals Eighth Circuit.

Illinois Central Railroad Company, Plaintiff in Error,
No. 8014. vs.
G. I. Crail.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

EDWARD C. CRAIG,
Chicago, Ill.

ARNOLD L. GUESMER,
HARRY S. CARSON,
EDWIN C. BROWN,
CHAS. A. LOUGHIN,
Minneapolis, Minn.,
1000 Metropolitan Life Bldg.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 31, 1927.

(Appearance of Counsel for Defendant in Error.)

The Clerk will enter my appearance as Counsel for the Defendant in Error.

STANLEY B. HOUCK.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 30, 1927.

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53 (Order of Submission.)

May Term, 1928.

Wednesday, May 9, 1928.

Before Judges Kenyon, Symes and Martineau.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Edward C. Craig for plaintiff in error, continued by Mr. Stanley B. Houck for defendant in error and concluded by Mr. Edwin C. Brown for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(Order Vacating Submission and Setting Cause for Hearing on January 9, 1929, with Leave to File Further Briefs.)

September Term, 1928.

Saturday, December 1, 1928.

It is ordered by this Court that the submission of this cause to this Court, be, and the same is hereby, vacated and set aside, and this cause is hereby set for reargument and submission at the foot of the calendar for Wednesday, January 9, 1922, with leave to counsel for the respective parties to file further briefs if they so desire.

December 1, 1928.

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54 (Order of Submission.)

December Term, 1928.

Saturday, January 12, 1929.

Before Judges Lewis, Kenyon and Cotteral.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Edward C. Craig for plaintiff in error, continued by Mr. Stanley B. Houck for defendant in error and concluded by Mr. Edwin C. Brown for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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55 (Opinion.)

United States Circuit Court of Appeals Eighth Circuit.

December Term, A. D. 1928.

Illinois Central Railroad Company, Plaintiff in Error,
No. 8014. vs.
G. I. Crail, doing business as P. McCoy Fuel Company,
Defendant in Error.

In Error to the District Court of the United States for the District of Minnesota.

Mr. Edward C. Craig and Mr. Edwin C. Brown (Mr. R. V. Fletcher and Messrs. Guesmer, Carson, Brown & Loughin were with them on the brief), for plaintiff in error.

Mr. Stanley B. Houck (Mr. W. Yale Smiley was with him on the brief), for defendant in error.

Before Lewis, Kenyon and Cotteral, Circuit Judges.

Kenyon, Circuit Judge, delivered the opinion of the court.

This case, involving the amount of recovery for the loss of five thousand five hundred pounds of coal in transit, is here for the second time on writ of error from the District Court of the United States for the District of Minnesota. The judgment originally entered by the trial Court was reversed by this Court, and the case remanded to the District Court with instructions. Crail vs. Illinois Central R. Co., 13 F. (2d) 459. The trial Court in rendering judgment delivered an extended opinion, which will be found in 21 F. (2d) 836

Reference to these two decisions will give full enlight-
56 enment as to the facts. The case was originally tried under a stipulation waiving a jury, and also a stipulation of facts. It is unnecessary to set forth this stipulation. Upon the second trial in the District Court after the reversal of judgment by this Court an amended stipulation of facts was entered into, which differed only slightly from the stipulation in the first case. It is claimed by plaintiff in error that the new amended stipulation was sufficient to constitute the case a different one from the case made at the first trial. The trial Judge held that it did not substantially change the case, and entered judgment in accordance with the opinion of this Court. We are satisfied that the case now presented is the identical one presented to this Court and decided in 13 F. (2d) 459. We are therefore confronted with the question as to whether or not on the second writ of error we should reconsider the legal question decided when the case was here before, i. e., the rule of damages to be applied for the loss of the coal in shipment. The rule laid down by this Court in its former decision became the "law of the case." While it is within the power of the courts to disregard the rule of "law of the case" in the interest of justice, it is the general practice of courts to refuse "to reopen what has been decided." Supervisors vs. Kennicott, 94 U. S. 498; Clark vs. Keith, 106 U. S. 464; Thompson vs. Maxwell Land Grant Co., 168 U. S. 451; Messenger vs. Anderson, 225 U. S. 436; National Bank of Commerce vs. United States, 224 F. 679; United Press Ass'ns vs. National Newspapers Ass'n, 254 F. 284; Chase vs. United States, 261 F. 833; City of Seattle vs. Puget Sound Power & Light Co., 15 F. (2d) 794. We are satisfied that the situation presented here is one calling

for the application of the rule of "law of the case", and we so hold. Affirmed.

Filed February 20, 1929.

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57 (Judgment.)

United States Circuit Court of Appeals Eighth Circuit.

December Term, 1928.

Wednesday, February 20, 1929.

Illinois Central Railroad Company, Plaintiff in Error,
No. 8014. vs.
G. I. Crail, doing business as P. McCoy Fuel Company.

In Error to the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that G. I. Crail, doing business as P. McCoy Fuel Company have and recover against Illinois Central Railroad Company the sum of Twenty Dollars for his costs herein and have execution therefor.

February 20, 1929.

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58 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the

rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Illinois Central Railroad Company was Plaintiff in Error and G. I. Crail, doing business as P. McCoy Fuel Company, was Defendant in Error, No. 8014, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eighteenth day of March, A. D. 1929.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 27, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
MAY 2 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. [redacted] 75

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDWIN C. BROWN,
EDWARD C. CRAIG,
Attorneys for Petitioner.

R. V. FLETCHER,
Of Counsel.

SOUTHERN-REMICK PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. .....

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Your petitioner, Illinois Central Railroad Company, respectfully states that it is greatly aggrieved at the rendition on the 20th day of February, A. D. 1929, of a judgment of the United States Circuit Court of Appeals for the Eighth Circuit against it in favor of the respondent, G. I. Crail, doing business as P. McCoy Fuel Company, in the sum of $34.58, together with interest and costs. (R. 20.)

Your petitioner respectfully states that this is a test

case. While the amount involved is small the effect of the judgment is far reaching and the case most important, not alone to your petitioner but to all carriers and shippers.

Your petitioner now prays this Honorable Court for a writ of certiorari so that said judgment may be reviewed and reversed.

Your petitioner shows that this suit was brought by the respondent against the petitioner in the United States District Court for the District of Minnesota to recover damages arising from the loss in transit of 5,500 pounds of coal from a car shipped from Royalton, Illinois, to Minneapolis, Minnesota. Both parties agree that the market value at destination is the measure of the damages. The respondent insists that the retail price governs. The petitioner contends that the market value of the coal *in the car* at destination is the market value to be applied.

On the first trial of the case a judgment was entered for the respondent for the sum of $17.71 and costs, based on the market value of the coal *in the car* at destination. The opinion of the District Court rendered at that time is reported as *Crail* v. *Illinois Central Railroad Company,* 2 Fed. (2d) 287.

From that judgment the respondent sued out from the Circuit Court of Appeals for the Eighth Circuit a writ of error, and that court, holding that the retail price applied, reversed the judgment entered by the District Court and remanded the case to the District Court with directions to grant a new trial. (*Crail* v. *Illinois Central Railroad Company,* 13 Fed. (2d) 459.)

The cause was reinstated in the District Court and was heard by that court without a jury on a revised stipulation of facts entered into between the petitioner and the

respondent. The respondent at the close of all the evidence made motion that judgment on the facts (R. 14) be entered against it on the basis of $5.75 a ton for the coal lost in transit—that being the market value of the coal had it not been lost and had it been delivered *in the car* at destination—the respondent having paid no freight on the coal so lost.

But that court, feeling itself bound by the decision of the Circuit Court of Appeals, and holding that the stipulation of facts on which the case was at that time submitted was not materially different from the stipulation of facts on which the case was formerly submitted, although still believing that the market value of the coal *in the car* at destination was, and the market cost of replacement was *not*, the proper measure of damages, denied the motion and decided for the respondent and entered a judgment for the respondent and against the petitioner in the sum of $34.58 (R. 40),—which judgment was based on the sum of $9.70 a ton for the coal so lost, being the retail value of the coal at that time in Minneapolis. (*Crail* v. *Illinois Central R. R. Co.* 21 Fed. (2d) 836.)

Thereupon, the petitioner sued out a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit. The case came on again to be heard, and that court, after requiring the case to be fully argued on two different occasions—once at St. Paul and once at St. Louis—affirmed the judgment of the District Court "on the law of the case." (R. 54, 55.) (*Illinois Central R. R. Co.* v. *Crail*, ... Fed. (2d) .....)

Importance of the Case.

The decision of this case by this court will settle the troublesome, important, and constantly arising question as to what is the proper measure of damage in a case

where part of a carload of coal is lost in transit. Without such decision it will not be settled. This has been an ever present source of dispute and controversy between the carriers and shippers since the decision by this court of the case of *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.* 253 U. S. 97. To have the question settled by this court will be welcomed by all the carriers and all the shippers of the country. In fact the carriers and shippers all over the country are awaiting the decision of this case by this court. Hundreds of cases have been held up and will not be disposed of until your Honors pass on and decide this case.

Decision of Circuit Court of Appeals Wrong.

Not only should the question involved be *decided* by this court, but the decision of the Circuit Court of Appeals is wrong and should be reversed by this court.

The District Court, when the case was first submitted to it (2 Fed. (2d) 287), decided the question correctly, and when its decision was reversed by the Circuit Court of Appeals, and the case was remanded, the judge of the District Court, feeling constrained to follow "the law of the case" entered judgment in accordance with the decision of the Circuit Court of Appeals. But, to use his language, the district judge—"with the fullest measure of respect for the Appellate Court," and acting "in the interest of justice," wrote a very illuminating, convincing and unanswerable opinion, holding that the case should be decided as we contend, and the damages based on the market value of the coal *in the car* at destination. This opinion appears on pages 20 to 39 of the printed transcript, is reported in 21 Fed. (2d) 836, and for ready reference has been added as an appendix to this petition.

When the case was again in the Circuit Court of Appeals that court caused the case to be *twice* argued before it—once at St. Paul on May 9, 1928, and the second time at St. Louis on January 12, 1929.

The court, after the first argument, took the case, and afterwards *on its own motion,* on December 1, 1928, set aside the order taking the case, and set it down for reargument at St. Louis. (R. 52, 53.)

Confict of Decisions.

Not only is the case (1) of the utmost importance to all carriers and shippers, (2) the decision wrong, but (3) the courts of the country are at variance in their decision of the question involved.

The courts of Iowa (*Brown Coal Co.* v. *I. C. R. R. Co.* 192 N. W. 920, 196 Iowa 562), Mississippi (*Yazoo & M. V. R. R. Co.* v. *Delta Grocery & Cotton Co.* 98 So. 777, 134 Miss. 846), and Louisiana (*Cottam & Co. Inc.* v. *I. C. R. R. Co.* 3 La. Ct. of App. 240), hold our way. The courts of New Jersey (*Heidritter Lumber Co.* v. *Central R. Co.* 122 Atl. 691, 100 N. J. Law Rep. 402; 125 Atl. 926) and Massachusetts (*Leominster Fuel Co.* v. *New York, N. H. & H. R. Co.* 154 N. E. 831, 258 Mass. 149), hold the other way—the *Leominster* case having been decided on the strength of the *Heidritter* case, and of the first decision of the Circuit Court of Appeals in *this* case.

Other decisions could be cited to show the contrarity of opinion. It would seem that this would suffice to show the manifest necessity of a decision by this court to settle not *alone* this case but the many others depending on it, and lay down for future guidance of the courts of the country the proper rule.

STATEMENT OF THE CASE.

This case was submitted to the court without a jury on a stipulation of facts. (R. 7-10.) The facts are therefore in no way in dispute.

The respondent is a resident of the District of Minnesota. The petitioner is a railroad corporation of the State of Illinois and is a common carrier of freight with its connecting lines from Royalton, Illinois, to Minneapolis, Minnesota. (R. 7.)*

The respondent is, and was at the time of the happening of the transaction out of which this suit arose, engaged in the fuel business at Minneapolis. (R. 7.)

The place for delivery of the car of coal involved was an industry track at respondent's coal yard in Minneapolis. (R. 7.)

On September 30, 1922, at Royalton, Illinois, petitioner, as initial carrier, received for transportation over its lines and those of its connecting carriers, to Minneapolis, P. M. C. K. & Y. car 91352 containing 88,700 pounds of Southern Illinois No. 2 nut soft coal, and at that time issued and delivered a receipt or bill of lading for the said carload of coal. (R. 78.)

While the car of coal was in *transit* the respondent purchased it, and the car was diverted to the respondent, and on October 17, 1922, delivered on the industry track at the respondent's coal yard at Minneapolis. (R. 8.)

The car at that time contained 83,200 pounds of coal, being 5,500 pounds of coal less than the said 88,700 pounds of coal. The portion of the said carload of coal consisting of 5,500 pounds of coal had been lost in transit. (R. 8.)

*All references to the record are to the paging of the printed transcript.

The car of coal was delivered at destination within a reasonable time for said transportation. (R. 8.)

At Minneapolis, on or about October 17, 1922, coal of the kind, size and grade contained in this shipment had a free and ready market in any quantity—whether less or more than one ton or by the carload or by a number of carloads. The sales and purchases in said market from day to day were substantial in number and volume. Purchases of carload lots containing 60,000 pounds or more in said market are termed wholesale purchases, and purchases of less than carload lots are termed retail purchases. (R. 8.)

On or about October 17, 1922, the fair, average, reasonable market value and price of carload lots of said Southern Illinois No. 2 nut soft coal, containing 60,000 pounds or more, where the coal became the purchaser's property at the time of shipment or was purchased in transit, as in this case, was $5.50 per ton f. o. b. original shipping point of the carload, which in this instance was f. o. b. Royalton, Illinois. (R. 8-9.)

On or about October 17, 1922, the fair, reasonable, average market value and price *at* Minneapolis of *carload lots* of Southern Illinois No. 2 nut soft coal *on track* at Minneapolis, as aforesaid, including the said industry track, was $5.75 per ton, plus freight, where the purchaser paid the freight, received the shipment on track, and himself unloaded the shipment, as was done by the plaintiff in this case. Quantities of less than carload lots were not obtainable in said market at said time and place at said price. (R. 9.)

On or about October 17, 1922, at Minneapolis, the fair, reasonable, average, market value and price of said Southern Illinois No. 2 nut soft coal, *when delivered at the expense of the dealer to the purchaser at his place of*

*business or home for consumption by such purchaser,** in lots of 5,500 pounds, was $13 per ton including freight, and said coal in said quantity to be delivered to the purchaser for consumption or any other use could not at said time have been purchased in said market for less. *At and prior to the time of delivery of said shipment involved in this case, less than carload lots of coal had not been sold in said market and delivered to or into any car on track.* (R. 9.)

The petitioner has paid the respondent nothing whatsoever on account of the loss of the coal aforesaid. (R. 9.)

The lawful freight charges applicable to said shipment were $3.30 per ton. This was at the carload tariff rate. The freight charges were paid on the said car of coal based upon 83,200 pounds of coal therein. (R. 9.)

The coal contained in said shipment had not been sold by the respondent, nor had its sale been contracted for prior to its arrival, nor was it sold or contracted for sale on October 17, 1922, *but the coal contained in the car was added to the general stock of coal of the respondent at Minneapolis.* Had this 5,500 pounds of coal been contained in the car it would have been added to the general stock of coal of the respondent at Minneapolis. *The respondent lost no sale of coal because the car of coal contained only* 83,200 *pounds of coal.* (R. 9-10.)

The respondent did not at any time use any coal for the purpose of replacing on this shipment, except the purchase to maintain his stock of coal, of that kind, in carload lots at $5.50 per ton f. o. b. mine, in regular and customary course of his business. Respondent ordinarily

*Italics are those of the author of this petition and brief.

purchased coal exclusively in carload lots f. o. b. mine. (R. 10.)

Had this car of coal when shipped from the mine contained only 83,200 *pounds of coal the respondent would have purchased it.* (R. 10.)

On and after October 17, 1922, respondent had on hand coal of the kind, size and grade in question, in quantities sufficient to meet the demands of his business. *The failure to receive the* 5,500 *pounds of coal aforesaid in no way interfered with the maintaining by the respondent of his ordinary and usual stock of coal.* (R. 10.)

Petitioner's services in the transportation of the coal in this case ended in the delivery of the car containing the coal upon the said industry track. The unloading of the coal and the further handling of the same for sale or delivery in less than carload lots was at the expense of the respondent. (R. 10.)

Contention of Petitioner.

Petitioner insists:

(1) That the court should have sustained the petitioner's motion for judgment in favor of the respondent and against the petitioner for the sum of $15.82 and interest and costs, based on the market value of the coal of $5.75 a ton on October 17, 1922, *in the car* on the industry track at Minneapolis—the time and place, when and where the coal should have been delivered. The stipulation on which the case was tried expressly providing that:

> "On or about October 17, 1922, the fair, reasonable, average market value and price at Minneapolis of carload lots of Southern Illinois No. 2 nut soft coal on track at Minneapolis, as aforesaid, including the said industry track, was $5.75 per ton, plus freight where the purchaser paid the freight,

received the shipment on track, and himself unloaded the shipment, as was done by the plaintiff in this case."

(2) That, as the duty of the petitioner ended when the carload of coal was delivered on the industry track at Minneapolis, and at that point the carload of coal had a market value of $5.75 per ton, plus freight, that value should be the measure of damages in this case.

(3) That the 5,500 pounds of coal lost in transit cannot be considered separate and apart from the carload lot, but in measuring its value it must be measured as if it were *in the car* and a part of the carload shipment on the track on which the car was delivered.

(4) That the respondent is only entitled to general damages, the allowance of which will make him whole.

(5) That the respondent claims no special damages and the facts show that he bought no coal to replace this coal lost, except in carload lots at $5.50 per ton, plus freight.

(6) That the respondent should not be punished or penalized for the loss of this coal and can only be compelled to reimburse the respondent for the loss actually suffered.

(7) That if the respondent be allowed the retail price he will be more than compensated for the loss actually suffered.

(8) That if the respondent be allowed the market value of the coal *in the car* and as a part thereof he will be paid "for the full actual loss, damage or injury" sustained by him, as required by the law.

(9) That the evidence as to the retail value of 5,500 pounds of coal is immaterial, as that price does not apply to coal in car on industry track.

(10) The respondent is only entitled to be reimbursed "for the full actual loss, damage or injury," and the maximum amount of his actual loss, damage or injury can only be $5.75 a ton. To award him $9.70 a ton is more than compensating him for the actual loss suffered.

Specifications in Error.

Petitioner now files the following as its assignment or specification of errors:

Petitioner complains that the following errors were committed by the United States Circuit Court of Appeals for the Eighth Circuit:

(1) The Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the District Court.

(2) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the respondent was entitled to $9.70 a ton for the 5,500 pounds of coal lost in transit.

(3) The Circuit Court of Appeals for the Eighth Circuit erred in refusing to enter judgment in this case on the basis of $5.75 a ton for the coal lost in transit.

(4) The Circuit Court of Appeals for the Eighth Circuit erred in applying to the coal lost in transit a market value disassociated from the carload of coal of which it was a part.

(5) The Circuit Court of Appeals for the Eighth Circuit erred in applying as a measure of damages in this case a market value which did not apply to the coal in car on track where petitioner was duty bound to deliver the same.

(6) The Circuit Court of Appeals for the Eighth Circuit erred in applying as a measure of damage the retail market value of the coal lost in transit.

(7) The Circuit Court of Appeals for the Eighth Cir-

cuit by its decision has allowed special damages when none are claimed, and in this the court has committed error.

WHEREFORE, the petitioner prays that the judgment herein be reversed and the cause remanded with directions to the Circuit Court of Appeals for the Eighth Circuit to enter a judgment reversing the District Court and directing that court to enter judgment as prayed for by the petitioner on the basis of $5.75 per ton for the coal lost in transit.

PRAYER.

Your petitioner now prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit and the Justices thereof, commanding that court to certify and send to this court a full and complete record of the transcript and all the proceedings of said United States Circuit Court of Appeals in this cause—entitled *Illinois Central Railroad Co.* v. *G. I. Crail, doing business as P. McCoy Fuel Company*, No. 8014—on the docket of said United States Circuit Court of Appeals, to the end that this cause may be reviewed and determined by this court.

And your petitioner prays that the certified copy of the record and proceedings of the United States Circuit Court of Appeals for the Eighth Circuit, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that it may have such other and further remedies and relief in the premises as to this court may seem appropriate and in conformity with law, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in this cause and every part

thereof be reversed by this Honorable Court, and this your petitioner will ever pray, etc.

This is the first application for writ of certiorari in this cause.

EDWIN C. BROWN,
EDWARD C. CRAIG,
Attorneys for Petitioner.

R. V. FLETCHER,
Of Counsel.

EDWARD C. CRAIG, being duly sworn, makes oath that he is one of the counsel for petitioner in the above cause and that he assisted in the preparation of the foregoing petition, and that the allegations therein contained are true as he verily believes.

EDWARD C. CRAIG.

Subscribed and sworn to before me this 30th day of April, A. D. 1929.

F. ADA HOWE,
(SEAL) *Notary Public for Cook County, Illinois.*

My commission expires May 21, 1930.

In my opinion the foregoing petition is well founded in law.

EDWIN C. BROWN.
EDWARD C. CRAIG.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. .....

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

This court, in the case of *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.* 253 U. S. 97, settled the question as to what law applies to this case. It there said:

> "The Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, provides that the carriers affected by the act shall issue a bill of lading and * * * shall be liable * * * *for the full actual loss, damage or injury.*"

It decided that notwithstanding the provisions of the bill of lading, the plaintiff was entitled to the value of the shipment "at the place of destination where it should have been delivered."

In that case there was, however, no question as to what that value was. Here there is.

It is apparent, however, from that decision that all the respondent can recover is an amount that will compensate him "for the full actual loss, damage or injury" sustained with reference to the loss of this coal in transit.

Obviously, that is the market value of the coal *in the car* at destination—$5.75 a ton. The facts disclose that the duty of the petitioner with reference to this car terminated when it delivered the car of coal on this industry track. (R. 10.) It was immaterial, as far as the petitioner was concerned, whether anything was done with the coal by the respondent when so delivered or not. Had the respondent sold the car of coal on the said delivery track at the market price, he would have received $5.75 a ton, whether the car contained 88,700 pounds of coal or only 83,200 pounds thereof.

If the *entire* car of coal had been *delivered,* it is agreed that the true destination *value* of the coal would have been $5.75 per ton. If the *entire* car had been *lost,* it is agreed that the *value* of the coal "at the place of destination where it should have been delivered" would have been the same, $5.75 per ton, and that that would be the true and proper measure of respondent's "full, actual loss, damage or injury." The above is *conceded* by both parties, including respondent.

Still respondent here claims the destination value of the coal was $9.70, *more* than $5.75, per ton,—*simply because a* PORTION *of the car, instead of the* ENTIRE *car, was lost in transit.*

If respondent's contention and the judgment ordered by the Circuit Court of Appeals herein are right, the destination *value* of the same coal was *enhanced by the*

mere fact that only a portion, instead of all, of the carload of coal was lost in transit. This noncausal circumstance fairly demonstrates the fallacy and fundamental unsoundness of respondent's position that the *market cost of replacement* is, here and always, the true test of *value* for assessing general damages in a failure-to-deliver or loss case. Market cost of replacement may, in a proper case, be one proper way of arriving at value, but it is an artificial and improper way where it results, as here, in a value considerably *in excess* of the conceded value of the same coal under circumstances different but without a distinction, and clearly *in excess* of the "full, actual loss, damage or injury" sustained by respondent.

If the market value of $5.75 a ton does not apply, then there is no evidence in the case as to the market value of the coal at destination. The retail price does not and can not apply as it has reference only to coal (R. 9) "when delivered at the expense of the dealer to the purchaser at his place of *business* or *home* for *consumption by such purchaser*" and (R. 9) "less than carload lots of coal had *not* been sold in said market and delivered to or into any *car on track.*"

This value of $5.75 a ton is the market value of the coal *in the car* at the place where the petitioner was duty bound to deliver it.

This court decided in the *McCaull Dinsmore* case, *ubi supra,* that by stipulation in the bill of lading the value at any other place cannot be the measure of the damage. If the value at the place of origin, or at some place *short* of the place of delivery, is immaterial, why is not the value at some place *beyond* the place of delivery immaterial? We are insisting that the value *at* the place of delivery is the measure.

This court has held in the case of *Southern Pacific Co.* v. *Darnell Taenzer Co.* 245 U. S. 531, that the court does not go beyond the first step nor concern itself with consequences which are remote, and that the measure of the damage is the value of the goods which have been lost had they been delivered at the time and place when and where under the contract of carriage they should have been delivered. That is what we are contending for in this case.

This court there said (pp. 533, 534):

> "The general tendency of the law, in regard to damage at least, is not to go beyond the first step, as it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events."

It was also said by this court in the case of *United States* v. *New River Collieries,* 262 U. S. 341, at pp. 343, 344:

> "The owner was entitled to the full money equivalent of the property taken, *and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken. * * * More would be unjust to the United States and less would deny the owner what he is entitled to.*"

There is no controversy in this case but that if the 5,500 pounds of coal which were lost in transit *had been delivered* with the rest of the coal *in the car,* it would have been worth $5.75 a ton. That being true, it would seem to follow that the only thing that the plaintiff lost was 5,500 pounds of coal, which, had it been delivered in accordance with the contract of carriage, would have been *in the car* at the place of delivery and would have been worth $5.75 a ton. Paraphrasing the language of this court in the *New River Collieries* case, *ubi supra,*—

"more would be unjust to the petitioner and less would deny the respondent what he is entitled to."

The plaintiff did not buy this coal separate and apart from its being a part of the carload of coal. The plaintiff did not buy any particular quantity of coal. He bought a carload of coal which happened to contain so much coal. A portion of it was lost. The plaintiff would have bought the car of coal had the coal which was lost not been in the car at the time he bought the carload of coal. (R. 10.) Had it been delivered as a part of this carload it would have been worth $5.75 a ton. The other coal in the car was worth $5.75 a ton and this coal would have been worth the same.

The correct measure of damages is the difference between the market value of the carload of coal had it arrived with all the coal in it, and the market value of the carload of coal as it did arrive with the 5,500 pounds of coal missing.

The question has been so well discussed by the district judge, in the opinion filed by him, a copy of which appears in the appendix hereto, and he has so admirably set forth the law as we contend it is, and has so conclusively shown why this case should be decided for us, that it occurs to us that in this preliminary, as it were, presentation of this case, a further discussion is unnecessary.

That court in its opinion, among other things, said (R. 23-25):

> "In cases such as the one at bar, therefore, where general damages only are claimed, a recovery for proximate loss only can be had,—a loss which follows naturally and in the usual course of things from the breach of contract. This is an unvarying rule to which there are no exceptions. With subsidiary rules there may be variations or exceptions. In such cases as this the court does not go beyond

the first step, nor concern itself with consequences which are remote. *Southern Pacific Co.* v. *Darnell-Taenzer Co.* 245 U. S. 531, 533. *The question is what loss plaintiff had sustained at the moment the car of coal was switched into his yard, with the* 5,500 *pounds missing therefrom.* It is not what loss might be figured out at a later time under entirely new and different conditions. Plaintiff's cause of action accrued at once upon failure to deliver and without waiting for later events. *Southern Pacific Co.* v. *Darnell-Taenzer Co., supra,* p. 534. It made no difference whether the coal was to be sold at wholesale or at retail, or was to be consumed by plaintiff himself. The proximate loss 'is the loss of what the contractee would have had if the contract had been performed.' *Chi. M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.* 253 U. S. 97. In this case that would have been the 5,500 pounds of coal *in the car,* which amount of coal at the time of delivery, was missing therefrom.

A subsidiary rule, applicable in cases of this character, is that plaintiff is entitled to recover the value of the commodity which has been lost, as that value would have been at the time and place of delivery if delivery had been made as agreed.

This rule is more elastic. In its application it does not always mean the same thing. Courts are often content with announcing the general rule without discussion as to its application. In various cases there is no difficulty about such application. In other cases the difficulty is very real. In various cases, as will be seen, this rule does not apply at all in any literal sense and would provide no adequate relief.

In the case at bar the broader, general and controlling rules must constantly be kept in mind; the plaintiff is entitled to be made whole. *He is not suing for coal, but for money. He is entitled to the money equivalent of that which has been lost. There is no occasion for punishing the defendant by allowing excessive damages. There is no occasion for allowing plaintiff to realize a gain out of the transaction.* He is not to receive a reward. He is to receive fair and reasonable compensation for his loss.

An unusual and outstanding feature of this case is the fact agreed upon, as to the value which the missing coal would have had at the time and place of delivery, if it had been delivered as agreed. There is no such element in the cases relied upon by plaintiff. *Here it is agreed to and is one of the settled facts in the case, and is beyond controversy, that if the coal which was lost had not been lost, but had been delivered to plaintiff with the other coal in the car, its value in such car at destination in plaintiff's yard would have been* $5.75 *per ton. This value so agreed upon must be understood to be the true value in the car at the time and place in question for any and all uses to which the coal might be put.*

If plaintiff had received the coal in question, he would have had in his possession a commodity which all agree was of the value of $5.75 *per ton. If he had it not, he obviously, so it may be urged, sustained a loss in that amount per ton on account of that which had been lost.* The carload of coal, when it reached plaintiff's yard, was worth that much less than it would have been if none had been lost. We are enabled to determine the amount in this particular case, because here we have the unusual experience of being provided with data showing value at the immediate time and place of delivery. *If the car had been delivered intact, the coal therein would have been worth* $255.0125. *As actually delivered with the last coal out, it was worth* $239.20. This is all agreed to. There is no cavil about it. *The difference of* $15.8125 *would ordinarily be regarded as the loss which plaintiff must have sustained.* This would be stopping at the first step, without inquiry into later conditions which might arise or develop, and without considering whether the coal was to be sold at wholesale, or at retail, or was to be consumed by the consignee."

Conclusion.

We therefore submit that the Circuit Court of Appeals for the Eighth Circuit instead of affirming the judgment of the District Court should have reversed the same and remanded the case to the District Court with directions to enter a judgment in accordance with the motion made by the petitioner at the close of the evidence (R. 14) to enter judgment against the petitioner on the basis of $5.75 a ton for the coal lost—being the market value thereof *in the car* at destination, and that in consequence the judgment entered by the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

Edward C. Craig,
Edwin C. Brown,
Attorneys for Petitioner.

R. V. Fletcher,
Of Counsel.

APPENDIX.

Opinion of the Judge of the United States District Court Rendered at the Time the Judgment Involved in This Case Was Entered. (R. 20-39.)

Memorandum.

This is an action brought by the consignee of a carload of coal against the railroad company which had undertaken to transport the coal. The amount of the shipment was 88,700 pounds. Of this amount 5,500 pounds were lost in transit. The destination was Minneapolis, Minnesota, and the delivery was on an industry railway track running alongside of or into plaintiff's coal yard at that place. It is agreed that at the time and place of delivery, coal of the kind here in question was worth $5.75 per ton, plus freight, in carload lots of from 60,000 to 120,000 pounds. It is also agreed that the same kind of coal at retail in the Minneapolis market, at the time in question, delivered at the place of business or home of the consumer, was worth $9.70 per ton, plus freight. Plaintiff claims that he is entitled to recover at the rate of $9.70 per ton for the coal which was lost. Defendant admits liability, but claims that the amount of recovery should be limited to $5.75 per ton. No freight was paid on the coal which was lost and that item may be eliminated from the discussion. The facts were presented to the court originally by stipulation and the opinion of this court thereon is found at 2 Fed. (2d) 287. That case was reversed by the Circuit Court of Appeals and the opinion thereon is found at 13 Fed. (2d) 459. The appellate court there held that a recovery should be had on the basis of $9.70 per ton. Thereafter the stipulation of facts was amended and amplified and with the stipulation so changed the case was again presented to the court on a second trial. This court is not satisfied that the amended stipulation of facts justifies the conclusion that the case has been substantially changed. Following the decision of the Court of Appeals, therefore, it is the duty of this court to allow a recovery at the rate of $9.70 per ton for the coal which was lost, and this will be done.

The case, however, is of rather unusual interest and importance. It is assumed that it is not inconsistent with the fullest measure of respect for the Appellate Court, to offer further suggestions in the interest of justice upon the questions involved. It is for this court to follow the decision of the Appellate Tribunal, but that Tribunal itself may at some time wish to re-examine the matters which are here in controversy. It is in that light and for that purpose only that the suggestions which follow, are made.

The case at bar is the ordinary case of a commodity purchased in bulk for the purpose of selling the same again at an advance, if possible, but without any necessity or occasion for going into the local market to replace any portion of the commodity which might be lost in transit. Under the circumstances hereinbefore set forth, as amplified by the stipulation of fact, what is the measure of damages in this case? Is plaintiff entitled to recover at the rate of $5.75 per ton, or at the rate of $9.70 per ton for the coal which has been lost?

Basically, the case is one for the recovery of damages for breach of contract. This particular controversy belongs to a sub-class of breach of contract cases. It involves a breach by a common carrier of its agreement to transport and deliver freight. The same general rules apply here as in all other cases of breach of contract. It will be seen that certain subsidiary rules are specially applicable. The difficulty in such cases arises in estimating the amount of the loss which the plaintiff has sustained. The courts have said that in this connection each case must be governed by its own facts. *Mangin* v. *Dinsmore*, 62 N. Y. 35. *Magdeburg General Insurance Co.* v. *Paulson*, 29 Fed. 530, 532. This does not mean that the cases are beyond the rules. They are not; it is at this point that the subsidiary rules intervene.

In the former opinion of this court certain outstanding features of the case were not made sufficiently clear.

1. Cases of the character here in question fall into certain groups or classes, and rules which apply to one class quite often do not apply to another. A classification upon one basis is as follows:

a. Cases where general damages only are involved.

b. Cases where special damages are claimed.

Upon another basis the classification may be as follows:

a. Cases where the consignee is under no necessity or compulsion to go into the local market and purchase commodities with which to replace those which have been lost.

b. Cases where by reason of special circumstances the consignee is under some reasonable compulsion to replace the lost commodity by purchasing in the local market.

There are doubtless other classifications of less importance.

The classifications above specified may very nearly duplicate each other. That is, all cases where there is no necessity of replacing the lost commodity would generally fall under the head of general damage cases; and very generally cases where the lost commodity must be replaced would fall under the head of special damage cases, but the distinguishing features of both classifications are important, because sometimes one basis of classification is emphasized by the courts and sometimes another, and because collectively they furnish the bases for the various rules which are announced; which rules, as applied to a particular situation may be quite correct, but which if applied to a different set of facts may work an injustice.

2. The fundamental rule in all cases involving damages for breach of contract is that the damages recoverable are such only as, in theory of law, may fairly be said to have been within the contemplation of the parties when the contract was made.

17 C. J. 742-746, Sec. 76.

Harvey v. *Conn. & Passumpsic R. R.* 124 Mass. 421, 423-4.

By the expression "general damages" is meant such damages as follow naturally and in the usual course of things from a breach of contract. In all ordinary cases it is general damages only which are held to have been within the contemplation of the parties. In such cases the question is what is the immediate loss without going beyond the first step.

17 C. J. 712, Sec. 20.

17 C. J. 742, Sec. 76.

"Special damages" are such as do not follow naturally or in the usual course of things from such a breach, but are such as arise out of unusual or special circumstances. Such circumstances, however, give rise

to no claim for additional or special damages on account thereof, unless the circumstances were known in advance by the respective parties, and unless the consequences of the breach and loss under such circumstances were known to and in contemplation of the parties when the contract was made.

17 C. J. 712, Sec. 76.
17 C. J. 746, Sec. 77.

3. In this case plaintiff sues for general damages only. There is no allegation of special damages in the complaint and no proof thereof in the stipulation of facts.

Here, if the fact is at all important, there is no claim or proof that, prior to the loss in question, defendant had any knowledge that the coal was being purchased for the retail trade; and the circumstance of such intended use appears, if at all, only as a matter of inference from the stipulated facts.

4. In cases such as the one at bar, therefore, where general damages only are claimed, a recovery for proximate loss only can be had,—a loss which follows naturally and in the usual course of things from the breach of contract. This is an unvarying rule to which there are no exceptions. With subsidiary rules there may be variations or exceptions. In such cases as this the court does not go beyond the first step, nor concern itself with consequences which are remote. *Southern Pacific Co.* v. *Darnell-Taenzer Co.* 245 U. S. 531, 533. The question is what loss plaintiff had sustained at the moment the car of coal was switched into his yard, with the 5,500 pounds missing therefrom. It is not what loss might be figured out at a later time under entirely new and different conditions. Plaintiff's cause of action accrued at once upon failure to deliver and without waiting for later events. *Southern Pacific Co.* v. *Darnell-Taenzer Co. supra,* p. 534. It made no difference whether the coal was to be sold at wholesale or at retail, or was to be consumed by plaintiff himself. The proximate loss "is the loss of what the contractee would have had if the contract had been performed." *Chi. M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.* 253 U. S. 97. In this case that would have been the 5,500 pounds of coal in the car, which amount of coal at the time of delivery, was missing therefrom.

5. A subsidiary rule, applicable in cases of this character, is that plaintiff is entitled to recover the value of

the commodity which has been lost, as that value would have been at the time and place of delivery if delivery had been made as agreed.

This rule is more elastic. In its application it does not always mean the same thing. Courts are often content with announcing the general rule without discussion as to its application. In various cases there is no difficulty about such application. In other cases the difficulty is very real. In various cases, as will be seen, this rule does not apply at all in any literal sense and would provide no adequate relief.

In the case at bar the broader, general and controlling rules must constantly be kept in mind; the plaintiff is entitled to be made whole. He is not suing for coal, but for money. He is entitled to the money equivalent of that which has been lost. There is no occasion for punishing the defendant by allowing excessive damages. There is no occasion for allowing plaintiff to realize a gain out of the transaction. He is not to receive a reward. He is to receive fair and reasonable compensation for his loss.

6. An unusual and outstanding feature of this case is the fact agreed upon, as to the value which the missing coal would have had at the time and place of delivery, if it had been delivered as agreed. There is no such element in the cases relied upon by plaintiff. Here it is agreed to and is one of the settled facts in the case, and is beyond controversy, that if the coal which was lost had not been lost, but had been delivered to plaintiff with the other coal in the car, its value in such car at destination in plaintiff's yard would have been $5.75 per ton. This value so agreed upon must be understood to be the true value in the car at the time and place in question for any and all uses to which the coal might be put.

If plaintiff had received the coal in question, he would have had in his possession a commodity which all agree was of the value of $5.75 per ton. If he had it not, he obviously, so it may be urged, sustained a loss in that amount per ton on account of that which had been lost. The carload of coal, when it reached plaintiff's yard, was worth that much less than it would have been if none had been lost. We are enabled to determine the amount in this particular case, because here we have the unusual experience of being provided with data showing

value at the immediate time and place of delivery. If the car had been delivered intact, the coal therein would have been worth $255.0125. As actually delivered, with the lost coal out, it was worth $239.20. This is all agreed to. There is no cavil about it. The difference of $15.8125 would ordinarily be regarded as the loss which plaintiff must have sustained. This would be stopping at the first step, without inquiry into later conditions which might arise or develop, and without considering whether the coal was to be sold at wholesale, or at retail, or was to be consumed by the consignee.

7. Notwithstanding the foregoing considerations, it is urged by plaintiff that even in such a case as this, where we know the value of the coal at destination, the plaintiff is entitled to recover, not that value, but a considerably greater amount, represented by the retail selling price of such coal at such place. The reasons assigned are

a. That if plaintiff had received the coal according to agreement, he could have sold it at the retail price; and

b. That if plaintiff had wished to replace the missing commodity, he would have been obliged to pay the retail price at destination for the coal which he would purchase.

These reasons may be considered in their order.

(a) The value per ton in the car, $5.75, allows plaintiff an advance of $.25 per ton over the mine price. Some, or all of this is profit. That is included in the proximate loss which the plaintiff sustained through non-delivery. In this respect the case is similar to *Chi. M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.* 253 U. S. 97, where the advance was somewhat over $200. on an entire carload of wheat which was lost. No retail prices were involved in the McCaull-Dinsmore case. The spread between this value of the coal in the car, and the retail price thereof, all at destination, is $3.95 per ton. But a large part of this is absorbed in the operation of retailing. The coal must first be unloaded from the car. It must then be sold to some customer. It must next be reloaded into trucks or wagons, and then transported perhaps several miles to the place of business or home of the consumer, and there delivered to him. The stipulation of facts is to the effect that it is only after all this has been done that the $9.70 per ton can be realized. Along therewith there has been the overhead expense, the insurance, the making of collections, the risk of and allowance for bad debts, and

the directing services of the plaintiff himself. We know that the aggregate of these items amounts to a considerable sum per ton. The plaintiff has not advised us thereof in detail. To get his $3.95 per ton, he is obliged to pay out a good part thereof in the course of the retailing operation, and besides must render or provide proper supervision as well. We do not know the amount of the net profit. It must be a rather modest sum. In any event, such profit, no doubt, bears some proper relation to the original cost of the coal and to the risks which are assumed and the expenses which are incurred and the considerable service which is rendered in connection with the retail trade. The $3.95 per ton is the sum of legitimate and necessary additions to the carload price, which must be made in connection with the retail operations in order that those operations may be successfully carried on. All this, however, is remote from the time, place and circumstances which should determine the amount of plaintiff's proximate loss. By the decision in this case we are awarding plaintiff $3.95 per ton over the carload price. This is much better for him than to have received the coal. He gets the full retail price without any risk or expense and without the work of any retail operations whatever. Had he received the coal, it is hardly possible that he could have realized net thereon, above cost and above the necessary expense of the retail operations, more than from $1.00 to $1.25 per ton. As to the figures, this is in part speculation, but necessary speculation, in as much as accurate information has not been adduced by the contending parties, but no matter what the precise figures may be, the conclusion must be the same,—that looked at from the standpoint now under consideration, the award is substantially in excess of any legitimate loss which the plaintiff has sustained. In the face of many authorities against the allowance of profits in such cases, it is barely possible that net profits at retail might be allowed here, but that would be in violation of the rule limiting the recovery in such cases to damages for the proximate loss, and in any event, we have no definite information as to what the profits would have been. It is quite clear that the considerable amount per ton necessarily expended in carrying on the retail operations could not, upon any legitimate theory, be included in the recovery here.

In 4 Sutherland on Damages, 4th Ed. Sec. 1098, p. 4178, the rule said to be applicable in such cases, and which is frequently quoted by the authorities, is stated as follows:

> "The retail price of property held for sale is not the standard by which its value is to be determined. Where a quantity of merchandise is sued for, the retail price would be unjust, for the merchant in fixing that price takes into consideration, not only the first cost of the goods, but store rent, clerk hire, insurance and probable amount of bad debts, and adds to all these a percentage of profit. This must be understood of a considerable quantity, not of a single article."

In theory of law, and presumably as a matter of fact, it was as advantageous to plaintiff to sell this coal at $5.75 per ton in the car, as it would have been to sell the same coal at $9.70 per ton at retail. The former price allowed a reasonable advance over the mine price, considering the risks assumed and the service required in connection therewith; the latter allowed a reasonable advance, we may assume, over the cost of the coal and the necessary risks, expense and service in connection with the retail operations. Looking forward to selling the coal at retail, or to making any other use thereof, it was worth in the car the sum of $5.75 per ton and no more. After the lapse of some period of time and under changed conditions, and after the expenditure of considerable effort and the incurring of considerable expense, plaintiff might have sold the coal for the gross sum of $9.70 per ton. Does that fairly measure his proximate loss on account of the non-delivery thereof?

(b) Another reason assigned for recovery here on the basis of the retail price per ton, is that if plaintiff would have been obliged to pay the retail price therefor. Inferentially it is assumed in such claim that plaintiffs have the right in all such cases to go into the market and buy at retail for the purpose indicated. Such statement of the rule has crept into the law and has been given a somewhat general application, because in some of the earlier cases and in various other cases since, the circumstances have been such that the claimant had the right to go into the market and replace the commodity which had been lost. This was sometimes in the whole

sale market, and sometimes in the retail market, depending upon the character and amount of the goods which had been lost.

In determining the amount of damages in any case where general damages only are claimed, it is the proximate loss with which we are concerned. In all such cases the carrier is bound to pay the value of the goods as such value would have been at the precise time and place of delivery, under conditions there contemplated, if the delivery had been made as agreed. If we have means agreed upon for the ascertainment of that value, as we have here, without resorting to retail prices, then we are not specifically concerned with the latter. The value in the car and the cost of replacement might be two very different things. If we were dealing with carloads of wheat, or cotton, or flour, or lumber, or coal, such value and the cost of replacement would be the same. In such cases courts have sometimes said that the consignee is entitled to recover such sum as would enable him to go into the market and replace that which had been lost. That happened to be true with respect to carload lots, only as the result of a coincidence. Such are ordinarily cases without special damages, and the ordinary rules apply. The consignee in such cases is entitled to recover the amount of his proximate loss. But in such cases the value per unit of the carload which has been lost is the same as the value per unit of another carload of the same commodity at the same place; the proximate loss and the cost of replacement are the same; and so the statements of the courts above referred to, though literally correct, are misleading if given a more extended application. The statements are true as to that particular class of cases.

There are other classes of cases where such general statements are made by the courts and are then lifted bodily, as it were, and given a broader and inaccurate application elsewhere. We are here concerned with and are speaking of the typical case of general damages,—such as follow naturally and in the usual course of things from the breach, and with values at the precise time and place when and where delivery should have been made,—not at some other time or place. By way of contrast and illustration it is not wholly improper to refer to some of these other classes and to the statements of the court

made in reference thereto. In this connection there are the unusual cases of various kinds where under special circumstances, on failure to deliver, the consignee is under some reasonable compulsion to go into the market and purchase at retail. In all such cases his actual loss is measured by the amount he is required to pay. This may occur with reference to many articles or commodities which may be necessary for the daily requirements of the consignee in his private life, or in his occupation or business, and where, if goods purchased do not arrive, he must go into the market and supply them otherwise; or it may be a case where he has already sold the commodity in advance and where he must go into the market to purchase that with which to make up the exact amount which he has lost. All these, however, are usually cases of special damages which require special pleading, and, properly, should be dealt with along those lines, although this point is not always made. *Vanderbilt* v. *Ocean S. S. Co.* 215 Fed. 886, 890. Here again, courts may make the general statement that in case of loss in transit the consignee is entitled to recover such sum as will enable him to go into the local market and replace the commodity by a purchase at retail. Such statement, made in general terms, may be correct as applied to the particular case there in hand, but, it may be urged, is incorrect when extended to a case where general damages only are involved. It will be observed, however, that in all these cases of special damages the consignee obtains no advantage and realizes no profits on the transaction; and the defendant is not mulcted in damages, arbitrarily or unnecessarily, but is required to pay such an amount only as will make the plaintiff whole.

Again, there are the cases where general damages only have been sustained, but where there is difficulty in fixing values as of the time and place of delivery. In such cases it is sometimes necessary to resort to values at the time and place of shipment and therefrom, as nearly as may be, to estimate the value at destination. *Northern Commercial Co.* v. *Lindblom,* 162 Fed. 250, 255. *The Arctic Bird,* 109 Fed. 167, 175. Sometimes it is necessary to resort to retail prices at destination and therefrom, as nearly as may be, to estimate values in bulk or otherwise at that place. And sometimes, in cases in-

volving single articles, or under unusual circumstances, the retail price at destination is the substantially correct measure of value of the lost article or articles at that place. The question of value at destination is always a question of fact, and it must be determined as other questions of fact are determined, upon the best evidence available for that purpose. In such cases again, courts sometimes make general statements which give trouble when applied in other cases. It is clear, however, that in cases where the value at destination is agreed upon and is a settled fact, the troubles respecting these matters of evidence do not obtrude.

There was no necessity, occasion or advantage here for the plaintiff to go into the local market for the purpose of purchasing coal with which to replace that which had been lost. There is strong ground for urging that a consignee of commodities in case of their loss in transit has no absolute or universal right to go into the local market at the point of destination and purchase goods at retail, with which to replace that which has been lost. He may do this only to the extent which may be reasonably necessary to protect his rights,—not the sentimental right of having a thing at all hazards, because he has bargained for it, and this without regard to the rights of others, but his substantial rights and interests. He should not be permitted to purchase at retail when this places an excessive burden on others and does himself no good. He may not insist on this one burdensome method of adjustment, when other methods, quite as favorable to himself, and less harsh to others, are equally available. He should not be permitted to mulct the carrier in an amount in excess of what he has actually suffered. To do so would work an evident injustice. The carrier has some rights, as well as the consignee.

In cases such as this, involving the loss of part of a shipment of a considerable quantity, all to be resold, (and these features are mentioned, not to create a separate class, but because a case of this character serves well as an illustration and covers the case at bar), and where general damages only are involved, it may fairly be said, from what we know of human conduct, not only that the consignee is not obliged to go into the local market and buy, but, more than this, that he never does such a thing, does not wish to make any such purchase, and

will not do so unless under some form of compulsion. Moreover, if in this case plaintiff had purchased at retail and had paid $9.70 per ton and had placed his coal in the car to take the place of that which had been lost, the coal so purchased at retail would have been worth $5.75 per ton in the car, and no more. If we compel defendant to reimburse plaintiff on account of the supposed new purchases, we require it to pay $9.70, so that plaintiff may have $5.75. Again, by establishing the rule prayed for by plaintiff, we make assurance doubly sure that under the circumstances here involved, no consignee will ever make a purchase at retail. Such an award as he asks, places him at a substantial advantage over the position in which he would be if he should go into the market and buy. If he should actually buy, he would then have the coal on his hands and would be obliged to sell the same again, either at wholesale, or at retail. If he should sell at wholesale, he would receive $5.75 per ton for the coal. If he should sell at retail and should succeed in making collections he would finally realize the comparatively small amount of profit which the retail business affords; but we are giving him a sure net profit of $3.95 at the outset above the value of the coal in the car, and are relieving him of all care, annoyance, expense and risk of the retail trade in connection therewith. No one would be so stupid as to buy and handle the coal under such circumstances. We have a sure guaranty that he would not. He would keep the money.

8. The stipulation of facts states that all sales of coal of the character here in question, of less than 60,000 pounds, in the local market at the time and place in question, were considered sales at retail. It is further stipulated that the retail market price of 5,500 pounds of such coal at such time and place was $9.70 per ton. The stipulation does not specify the retail price of quantities of such coal weighing more than 5,500 pounds and less than 60,000 pounds. Drawing upon the current fund of general information for purposes of illustration, we may readily conclude that the retail price holds good for all quantities sold at retail. It is common knowledge that this is so, or that the variation is very slight. A man who buys 5,500 pounds or 2¾ tons of coal, at retail, pays the same price per ton as the man who buys 55,000 pounds, or 27½ tons. As already indicated, the value of the entire carload of coal delivered in plaintiff's yard in

Minneapolis, if none had been lost, would have been $255.0125. If all had been lost, the recovery would have been limited to that sum. Under the rule which is being applied in this case, if the weight of the coal which was lost had amounted to 55,000 pounds, plaintiff would be entitled to recover the sum of $266.75, on account of such loss,—an amount substantially greater than he could have recovered if the entire carload had been lost; and in addition thereto he would have on hand that part of the coal which was not lost, amounting to 33,700 pounds. Can this be a correct application of a correct rule?

9. Again, if we assume that the carload of coal in question had been purchased by a wholesale dealer, where does the rule contended for by plaintiff lead us? Confessedly, such wholesaler purchased the entire lot for the purpose of selling again at wholesale. Confessedly, the coal and each ton thereof, in the car would have been worth $5.75. It would sell for that and no more. That is the price which the wholesaler would ask for it and which he would expect to obtain for it, and the price which afterward he would realize therefor, when a sale should be made. The 5,500 pounds of coal is missing. If it had been in the car it would have been worth the same amount per ton as the other coal there, and would have sold for the same price. Under such circumstances is it possible that the wholesaler would have a right arbitrarily to say to the carrier: "I want that coal. It is worth only $5.75 per ton to me. I do not need the coal itself for any purpose. If I receive $5.75 in money for each ton thereof, I would be as well off as if I had the coal; but I want the coal and you must pay me $9.70 per ton for it, because that is the amount I must pay in the local market for other coal to replace that which has been lost." Or might the wholesale dealer in such case go a great deal further, as the plaintiff does in the case at bar, and say: "You have lost my 5,500 pounds of coal. I do not want it, or need it. I am not going to try to replace it. If I had it here in the car it would be worth only $5.75 per ton. That is my proximate loss. I could not sell it there for more than that amount. I am selling the remainder of the carload at that price. My only loss measured in money is the loss of the value of that coal in the car. But I demand that you pay me for the missing coal the price which I would have to pay for it at retail, if I desired or was obliged to replace it. That is $9.70 per ton." If

such a claim should be allowed, the wholesaler would be making money fast on lost coal. He would always wish for generous losses on all shipments to him. Admitting that the coal was worth only $5.75 per ton in the car and that if the missing coal had been there, he would have sold it at that price, he is nevertheless demanding $9.70 per ton therefor. It would seem quite improbable that the wholesale dealer would be allowed to successfully make such a claim. Quite clearly he would have to be content with $5.75 per ton. The coal of a retailer in a car, however, is worth no more than the same coal would be worth if owned by a wholesale dealer, and in case of the non-delivery of any part thereof, the loss would be precisely the same. There cannot be one measure of damages for the one dealer and another measure for the other.

Again, in testing the general accuracy of the decision here, the following considerations are not without some bearing: The carload of coal as delivered, with the missing coal out, was worth $239.20. If the carload had been intact, it would have been worth $255.0125. If instead of any coal having been lost, the carload of coal had been damaged so that when delivered it was worth only $239.20, then under all the authorities, the amount of recovery would be the difference between the value as actually delivered, and its value as it should have been if delivery had been as agreed. *United S. S. Co.* v. *Haskins*, 181 Fed. 962, 965, *Magdeberg, etc.* v. *Paulson*, 29 Fed. 530, 532-3. Such difference and the amount of such recovery would be $15.8125. But here, where the real loss is confessedly the same, we allow a recovery of $26.675. Or, stated otherwise, if two cars had been shipped, one to each of two separate dealers at the same destination, and if the coal in one car had been damaged in transit, so that on delivery, the carload was worth only $239.20, where it should have been worth $255.0125, and if from the other car certain coal had been lost in transit, so that such carload when delivered was worth also $239.20, when it should have been worth $255.0125, we would be allowing a recovery of $15.8125 in one case, and of $26.675 in the other.

10. From the foregoing it is reasonably clear that there is much confusion in the cases, and in the statement of the rules, and in their application to situations which are widely different. It is apparent that distinctions

which go well nigh to the root of the matter are sometimes overlooked. These distinctions seem to be vaguely in mind in some instances, where right conclusions are reached, without stating correctly the underlying reasons therefor. We speak of pleading special damages, and of values at the time and place of delivery, and of retail prices, and of profits, and of the right to go into the market and buy, and of the risk, cost and service in connection with retail operations, and of the price at which the commodity in question will sell in the local market. These matters are discussed indiscriminately in all kinds of cases where commodities have been lost in transit.

A distinction between the rule applicable to the loss of a separate article and that applicable to the loss of a larger quantity of merchandise, and especially when the latter is held for resale, is suggested in the quotation from Sutherland on Damages, *supra*. There is grave doubt whether there is any satisfactory reason, operating uniformly and in all cases, which will support such distinction. Whether the commodity lost was large in quantity, or was a single article; whether the consignee intended to effect a sale at wholesale, or at retail, or intended not to sell at all; whether the commodity was new or secondhand, are all questions of a strictly subordinate character. The one question which is the same in all cases where general damages only are involved, is the value of the lost commodity as that value would have been at the time and place of delivery under the conditions there contemplated, if delivery had been made as agreed. The apparent difficulty with different cases, and in the application of the rules thereto, is often in the evidence necessary and in the application thereof. It often occurs that the value of a large quantity of any commodity is not the same as the retail price at which such commodity is being sold in the local market. It is not always so easy to prove the value of a single article at a given point without inquiring into the prices there prevailing at retail; but if the value of a separate article at a given point is shown to be different from the retail price of such article in the local market, such article then takes the same course as the commodity in large quantity and is dealt with the same; and it should be clearly understood that the only legitimate purpose of consulting local retail prices in any such case is for the light, if any, direct or indirect, which a knowledge of such prices may

shed upon the ultimate questions of value above referred to. It is a course of procedure, not at all controlling, but advisory, which is employed in determining that value. No recognition is involved of any arbitrary right on the part of the claimant in such cases to go into the local retail market under any and all circumstances, and there make an actual purchase.

11. If the foregoing observations be deemed mainly or largely incorrect, or inconclusive, they will be disregarded. If, in the main, they shall be found to be correct, it may perhaps be considered, with reference to the first two classes hereinbefore referred to, in the first of which falls the case at bar, that the rules applicable thereto should be as next hereinafter set forth, with such variations therein as may seem proper.

a. In the usual or ordinary case involving general damages only, where the commodities have been lost in transit and where the loss thereby sustained is such only as follows naturally or in the usual course from such loss:

Under such circumstances the single question is the amount of the proximate loss which has been sustained, and this in turn means what would the lost commodity have been worth in money at the precise time and place and under the conditions of the contemplated delivery, if delivery had been made as agreed.

If, by admission, or otherwise, on all the evidence, it is established that at such time and place the true value of the lost commodity was other than and different from the price at which such commodity was being bought and sold at retail in the local market, then such established value will be the measure of recovery; and the retail price will not prevail as a measure of recovery merely because that is the amount for which the plaintiff might have been able to sell the missing commodity at retail, or because, if he wished to replace the same, he would have been obliged to pay such retail price for the commodity with which to make such replacement.

If on the other hand, in such a case, either from absence or insufficiency of evidence, it is not satisfactorily established that the true value of the missing commodity, at the time and place of delivery, would have been an amount other than and different from the retail price thereof in the local market, then evidence of such retail price may be of greater weight and importance; and

where it is sufficiently persuasive of the true value, it may be accepted as indicating the proper measure of recovery. It is the value on the spot as that value would have been if the commodity had been delivered as agreed, with which we are concerned. That measures the proximate loss sustained by the consignee. It may, in certain cases, be the same as the retail price.

b. In the unusual case involving special damages, where the commodities have been lost in transit, and where by reason of special circumstances, the consignee has been under some reasonable compulsion to go into the local market and supply himself with the commodities which have been lost:

In cases under this head the consignee must pay the going price. If the goods which were lost consisted of carload lots, he then pays the price at which such quantities may be obtained. If the amount which he must have is obtainable at retail only, he must pay the retail price. Under such circumstances he must pay a certain amount to cover the cost of selling goods at retail and he must pay the retailer's profit, in justice to the carrier he should purchase at the lowest price at which the commodity is reasonably available. There is no question about the rule under such conditions. If the consignee pleads and proves the special circumstances, and that he was under reasonable compulsion to go into the local market and purchase either at wholesale or retail, and that such consequences were in the contemplation of the carrier and himself when the shipment was made, he may recover the amount which he was compelled to pay.

There are other cases involving the loss of commodities in transit which fall outside any of the foregoing classes. Such cases are comparatively few in number and usually are of minor importance, although this may be otherwise. There is the case of the loss of goods purchased for a seasonal market, by a retailer, under circumstances such that they cannot be replaced in time to meet the trade. Examples of this are certain classes of women's wear which are sold at a particular time of the year, and toys purchased for the Christmas trade. In such cases the merchant loses the season's sale of such goods and the profits which would have accrued thereon. Under such circumstances the questions of what the goods could be bought for at destination, or what they would have been worth on the spot where they should

have been delivered, are not important. The only questions are what they would have sold for at retail, and what the net profits would have been thereon. In such special cases the merchant is usually allowed such net profits on the anticipated sales. That would be his actual loss.

Again, there is the loss of machinery, or parts thereof necessary in carrying on industrial or mechanical operations, where the effect of such loss is to suspend such operations and causes inconvenience and loss. If such consequences were in contemplation of the parties, a recovery may be had on account thereof.

There are also cases, where a single article of value is lost in transit, or where partially used household goods, or wearing apparel, or mechanical equipment are lost, and where there is no standard of value applicable thereto, except the current prices at retail. In such cases those prices are sometimes allowed to control as being the best evidence obtainable, or they are used as a standard from which deductions may be made. Such cases, however, often fall within the class where the consignee is under the reasonable compulsion of going into the market and replacing the lost commodity by purchase at retail. The real reason for allowing a recovery on the basis of the retail price, therefore, is sometimes not clear.

These latter classes are all special in their nature and special rules for estimating the amount of the damages are applied.

12. Aside from the few citations hereinbefore made, the authorities generally applicable in this case are referred to in the two aforementioned opinions therein. There is no difference of opinion between the parties as to the rule for determining the amount of plaintiff's damage,—the value at the time and place delivery should have been made. The sole dispute arises over our resort to retail prices in determining that value when the value already has been agreed on before and without such reference.

Various cases are cited where, in a general way, and for one reason or another, the courts say that in the particular case there in hand, the plaintiff should recover such amount as would enable him to enter the local market and replace that which had been lost. Generally there is no quarrel with such cases. More common still is the general statement that plaintiff is entitled to re-

cover the value or market value of the commodity lost at the place of destination.

13. At the time this case was first decided the one case, which, arguendo, most strongly and directly supported plaintiff's claims was *Heidritter Lbr. Co.* v. *Central R. Co.* (N. J.) 122 Atl. 691, 692. Since then, to the same effect, has been decided the case of *Leominster Fuel Co.* v. *New York, N. H. & H. R. Co.* (Mass.) 154 N. E. 831. The latter case rests on the authority of the Heidritter case, and the decision by the Court of Appeals in the case at bar. In both the Heidritter case and the Leominster case, the most distinguishing and controlling feature of the case at bar was entirely absent. Reference is now made to the value, established by agreement of the parties, which the coal in question would have had in car at destination if delivery had been made as agreed. This feature was not sufficiently stressed by this court in its earlier opinion.

In the Heidritter case it was said that "the real question at issue is whether the plaintiff was entitled to recover the retail value at destination, rather than the wholesale value at the point at shipment." p. 691. In the Leominster case the alternative allowed by the evidence was the cost of the coal at the mine, plus freight, which defendant claimed was the true basis of recovery, and the retail price of such coal at the yards of dealers, or such price delivered in plaintiff's yard. Plaintiff claimed a recovery on the latter basis and such claim was allowed. In both cases it was held, in effect, that the plaintiff should recover on the theory that he had a right to go into the local market and replace the lost commodity by purchase at retail, which theory, for the reasons hereinbefore set forth should not be conceded. It will be observed that each of these two cases are within a much narrower compass than the case at bar.

We are dealing here with a commodity which has two well recognized values or prices in the same market: One is the value or price at wholesale, when we are dealing with lots of 60,000 pounds or over; the other the value at the end and of after a considerable amount of service and expense and risk, which we call the value or price at retail. The loss here is part of a wholesale shipment. Shall we apply the retail price in determining the loss or damage sustained? It is believed that aside from the decisions by the Court of Appeals, the two cases cited

are the authorities which tend most directly to support plaintiff's views. Aside from the Heidritter case, the authorities cited in the decision of the Court of Appeals in support thereof, in the main, are content with announcing the general rule. The Yazoo case therein cited will be later referred to. The case of *Cutting et al.* v. *Grand Trunk Ry. Co.*, 13 Allen, 381, also cited, was a case of replevin for a quantity of flour which the defendant had refused to deliver until certain charges thereon claimed by defendant should be paid. The court states the rule for the measure of damages in cases such as this, pp. 384, 385, and in connection with the discussion as to the measure of damages where there has been a delay in the delivery of goods, and a fall in the market value meantime, makes the statement quoted in the decision of the Court of Appeals herein. That excerpt and the decision throughout rests on the general statement of the value, or the market value of the goods at destination. The discussion goes no further. Profits are disallowed, p. 386, and at p. 387, it is said: "Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods." The general effect of this would be to hold plaintiff here to the value in the car. We, however, are asked to go much further than the allowance of profits. We are asked to allow and pay plaintiff for expenditures which he does not make, and for services which he does not render, and for risks which he does not take.

14. In opposition to the claims of plaintiff are a considerable number of cases which decline to adopt the retail market value as the measure of damages in cases such as this. They do not all employ the same reasoning, nor reach precisely the same results, but are all agreed in rejecting the retail price standard.

Brown Coal Co. v. *Illinois Central R. Co.* 196 Iowa 562, is a carefully considered case. If the foregoing views are correct, the court there should have allowed a recovery based on the value of the coal in the car at destination. There is some ground for urging, however, that there is no clear evidence of such value.

Yazoo & M. V. R. Co. v. *Delta Grocery & Cotton Co.* (Miss.) 98 So. 777, was an action to recover the value of certain flour lost or damaged in transit. It is there stated that "the exact point in controversy is whether the appellee, a wholesale grocer, is entitled to recover

* * * the invoice or cost price, plus freight," of the damaged flour, "or the resale value, (that is the price at which the flour could have been sold, or, as we will say, the reasonable cash market value) at the point of destination." p. 777. * * * "The damaged flour cost plaintiff $10.44 per barrel delivered at Clarksdale. Plaintiff recovered $11.30 per barrel for the damaged flour, which represents what plaintiff could have sold the flour for, or its reasonable wholesale cash market value at the point of destination." This wholesale cash market value is what defendant contends for here as the proper measure of recovery.

H. T. Cottam & Co. Inc. v. *Illinois Central R. Co.*, 3 La. Court of Appeal Reports, 240, was decided in October, 1925. The case was presented in such a way that contemplated profits occupied an important place in the case. These were disallowed and plaintiff held to the original cost of the merchandise, plus freight.

In *Central of Georgia R. Co.* v. *American Coal Co.* 28 Ga. App. 95, certain coal was lost in transit from a carload shipment. Plaintiff was limited in its recovery to the wholesale price at point of destination.

For further cases which decline to adopt the local retail price as the measure of damages in such cases, see the following authorities:

Chicago, R. I. & P. R. Co. v. *Broe*, 16 Okla. 25.

Texas & Pac. R. Co. v. *Payne*, 15 Tex. Civ. App. 58.

State v. *Smith*, 31 Mo. 566.

Cincinnati N. O. & T. P. R. Co. v. *Hansford*, 125 Ky. 37. In this case the evidence showed that the lost goods cost $317 and that if they had been received and sold at retail, a profit of $105.66 would have been realized thereon. There was no evidence as to what their value would have been at destination, or that it would have been more than the cost price. On that ground, as stated in the opinion, a recovery was limited to $317 and the prices at retail were disregarded.

Quanah A. & P. Co. v. *Novit* (Tex. Civ. App.) 199 S. W. 496.

15. For the reasons stated near the beginning of this opinion judgment will be entered allowing plaintiff a recovery at the rate of $9.70 per ton for the coal which was lost.

Dated September 23, 1927.

WM. A. CANT,
U. S. District Judge.

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CHARLES ELMORE
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 75

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

G. I. CRAIL, doing business as P. McCOY FUEL COMPANY,
Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.

EDWIN C. BROWN,
EDWARD C. CRAIG,
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Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 75.

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

G. I. CRAIL, doing business as P. McCOY FUEL COMPANY,
Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

This case is here pursuant to writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, granted (279 U. S. 833) on application of the Illinois Central Railroad Company (hereinafter referred

to as the petitioner), against which a judgment for $34.58 was entered in favor of G. I. Crail, doing business as P. McCoy Fuel Company, (hereinafter referred to as respondent) by the District Court for the District of Minnesota, Fourth Division (*Crail* v. *Illinois Central Railroad Co.*, 21 Fed. (2) 836), which judgment on writ of error was affirmed by the Circuit Court of Appeals (*Illinois Central Railroad Co.* v. *Crail*, 31 Fed. (2) 111).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The case was instituted in the United States District Court. As averred in the complaint, it arises "under the act of Congress of February 4, 1887 and the several acts amendatory thereof, including the so-called Cummins Amendment, an act of Commerce of March 4, 1915, 38 Stat. L. 1196, as amended by 41 Stat. L. 494, and is a suit and proceeding arising under the Constitution and Laws of the United States." (R. 2.)*

The suit is against the initial line for coal shipped from Royalton, Illinois, to Minneapolis, Minnesota, and lost in transit. A through bill of lading was issued by the petitioner for the interstate shipment as required by the act of Congress. The evidence not showing where it occurred, the presumption obtains that the loss occurred on the line of the delivering carrier. (*Chicago & North Western Ry. Co.* v. *Whitnack Co.*, 258 U. S. 369.) It is only by virtue of that act that the petitioner is liable.

The construction of that part of the Cummins Amendment relating to "full actual loss, damage or injury to such property" is therefore before the court and the

* The shipment moved in 1922 and hence was subject to Sec. 20 (11) of the Commerce Act as amended by the Transportation Act, 1920, and not to the subsequent amendments of July 3, 1926 and March 4, 1927.

court has jurisdiction regardless of the amount involved. (*Great Northern Ry.* v. *Galbreath Co.*, 271 U. S. 99, 101-2; *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201; *Macon Grocery Co.* v. *Atlantic Coast Line*, 215 U. S. 501, 507.)

United States Code, Title 28, Sec. 41 (1) (8) provides (Sec. 41 (1) (8), Title 28, Mason's United States Code) that—

> "The district courts shall have original jurisdiction * * * of all suits and proceedings arising under any law regulating commerce."

The case was tried in the District Court on a stipulation of facts (R. 7-10, 13), and was heard by the court, a jury having been waived. (R. 6.) At the close of the case the petitioner made a motion for judgment for the sum of $15.82—that being $5.75 per ton for the coal with interest to that date. (R. 14.) This motion was overruled and exceptions taken thereto. (R. 15.) The court after making special findings of facts (R. 17-18) and conclusions of law (R. 19), on the 23rd day of September, 1927, entered judgment against the petitioner as contended for by the respondent, being for the amount of $34.58—that being $9.70 per ton for the coal lost with interest. (R. 20.) On the 22nd day of October, 1927, petition for writ of error returnable to the United States Circuit Court of Appeals for the Eighth Circuit was filed with the District Court (R. 40-46) and was on that day allowed (R. 46-7)—the judge on that same day settling and allowing the bill of exceptions. (R. 6-16.)

The facts not being in dispute, and the decision turning on the judge's view of the law, which has been affirmed by the Circuit Court of Appeals, this court has jurisdiction of the case (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 269 U. S. 266; *Ward* v. *Joslin*,

186 U. S. 147; *St. Louis* v. *Western Union Telegraph Co.* 148 U. S. 96.)

The statutes sustaining the jurisdiction are Rev. Stats Secs. 649, 700 (Secs. 773, 875, Title 28, Mason's United States Code Ann. 1926).

Statement of the Case.

This is an action brought by the respondent—engaged in the fuel business at Minneapolis (R. 7)—the consignee of a carload of coal, against the petitioner. The amount of the shipment was 88,700 pounds. (R. 7.) Of this amount 5,500 pounds were lost in transit. (R. 8.) It arrived containing only 83,200 pounds of coal. The car of coal was shipped from Royalton, Illinois. (R. 7-8.) While in transit the respondent purchased it—the market price being $5.50 per ton f. o. b. shipping point (R. 8-9), and it was diverted to the respondent. (R. 8.) "Had this car of coal when shipped from the mine contained only 83,200 pounds of coal the respondent would have purchased it." (R. 10.) It was a "car of coal" he desired. The exact amount of coal contained therein was immaterial.

The destination after diversion was Minneapolis, Minnesota, and the delivery was on an industry railway track running alongside or into respondent's coal yard at that place. (R. 8.) Petitioner's services in the transportation of this coal ended in the delivery of the car upon the said industry track. (R. 10.) The unloading of the coal and the further handling of it for sale or delivery in less than carload lots were at the expense of the respondent. (R. 10.)

It is agreed that, at the time and place of delivery, coal of the kind here in question was worth on the track $5.75 per ton, plus freight, in carload lots of from 60,000 to 120,000 pounds. (R. 9-10.) It is also agreed that the same kind of coal *at retail** in the Minneapolis market at the time in question, delivered at the expense of the

*The italics used in this brief are those of the authors of the brief.

dealer to the purchaser *at the place of business or home of the purchaser for consumption by him,* was worth $9.70 per ton, plus freight. (R. 9.)* Respondent claims that he is entitled to recover at the rate of $9.70 per ton for the coal which was lost. Petitioner admits liability, but claims that the amount of recovery should be limited to $5.75 per ton. No freight was paid on the coal which was lost and that item consequently is eliminated. (R. 9.)

The coal contained in said shipment had not been sold by the respondent, nor had its sale been contracted for prior to its arrival, nor was it sold or contracted for on the day of its arrival, but the coal contained in the car was added to the general stock of coal of the respondent at Minneapolis. Had this 5,500 pounds of coal been contained in the car it would have been added to the respondent's general stock of coal. The respondent lost no sale of coal because the car of coal did not contain this 5,500 pounds of coal. (R. 9-10.)

The respondent did not at any time purchase any coal for the purpose of replacing this coal so lost from this shipment, except the purchase in carload lots to maintain his stock of coal at $5.50 per ton f. o. b. mine in the regular and customary course of his business. Respondent ordinarily purchased coal exclusively in carload lots f. o. b. mine. (R. 10.)

The failure to receive the 5,500 pounds of coal in no way interfered with the maintaining by the respondent of his ordinary and usual stock of coal. (R. 10.)

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* In the record and stipulation of facts contained therein the retail price of the coal is referred to as $13 per ton. This, however, *includes* freight of $3.30 per ton. (R. 9.) The price of the coal *in the car* of $5.75 per ton does *not* include freight. (R. 9.) As the freight on the coal lost was not paid and is out of the case, for the sake of clarity we refer throughout this brief to the retail price as $9.70, as that is the basic price on which the judgment in this case was entered.

The respondent had on hand at the time of the receipt of this car coal of the same kind and grade in quantities sufficient to meet the demands of his business. (R. 10.)

Action Taken by Courts Below.

There have been two judgments of the lower courts in this case. On the first trial, the facts being stipulated, the District Court held that the respondent was entitled to no more than $5.75 per ton for the coal lost and judgment was entered on that basis (2 Fed. (2) 287). The respondent sued out from the Circuit Court of Appeals a writ of error, and that court reversed the judgment, holding that the respondent was entitled to recover on the basis of $9.70 per ton (13 Fed. (2) 459).

The case having been remanded to the District Court, the stipulation of facts was amended and amplified, and with the stipulation so changed the case was again submitted to the trial court. But that court, feeling itself bound by the decision of the Circuit Court of Appeals, and holding that the stipulation of facts on which the case was at that time submitted was not materially different from the stipulation of facts on which the case was formerly submitted, although still believing that the market value of the coal *in the car* at destination was, and the *retail* market value at destination was *not*, the proper measure of damages, entered a judgment for the respondent and against the petitioner in the sum of $34.58 (R. 40)—which judgment was based on the sum of $9.70 per ton (with interest) for the coal so lost, being the *retail* market value of the coal at that time in Minneapolis. (*Crail* v. *I. C. R. R. Co.*, 21 Fed. (2) 836.)

The learned judge of that court filed with his order for judgment a memorandum opinion (R. 20-39), in which he set forth very illuminatingly the reasons why he still

believed the respondent entitled to recover only at the rate of $5.75 per ton, the market value of the coal *in the car* at destination, and not at the rate of $9.70 per ton, being the retail market price, of the coal lost.*

Thereupon, the petitioner sued out a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit. The case came on again to be heard, and that court affirmed the judgment of the District Court on the "law of the case." (R. 54-5.) (*I. C. R. R. Co.* v. *Crail*, 31 Fed. (2) 111.)

The Circuit Court of Appeals contented itself with a mere reference to the memorandum opinion of the District Judge in connection with further reference to its own earlier reported opinion and statement to the effect that the two together would afford "full enlightenment as to the facts," and did not attempt to discuss the question involved, concluding as follows (31 Fed. (2) 111):

> "We are satisfied that the case now presented is the identical one presented to this court and decided in 13 Fed. (2) 459. We are, therefore, confronted with the question as to whether or not on the second writ of error we should reconsider the legal question decided when the case was here before, *i. e.* the rule of damages to be applied for the loss of the coal in shipment. The rule laid down by this court in its former decision became the 'law of the case.' While it is within the power of the courts to disregard the rule of 'law of the case' in the interest of justice it is the general practice of courts to refuse 'to reopen what has been decided.' "

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* The editors of the Columbia Law Review (Vol. XXVI, No. 8, p. 1028) also disagree with the Circuit Court of Appeals. In that issue of December 1926 will be found a very plain statement of the salient points of the case, and the reasons why the decision of the Circuit Court of Appeals is wrong.

Statute Involved.

This action is brought under the provisions of the Act of Congress of February 4, 1887, and the several acts amendatory thereof including the so-called Cummins Amendment—an Act of Commerce of March 4, 1915, 38 Stat. L. 1197, as amended by 41 Stat. L. 494, which act contains among others the following provisions:

> "That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading *therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property,* caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad or transportation company so receiving property for transportation from any point in one State * * * to a point in another State * * * shall be liable to the lawful holder of said receipt or bill of lading, or to any party entitled to recover thereon * * * *for the full actual loss, damage or injury to such property* caused by it, or by any such common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass * * *."

Specification of Errors Relied Upon.

Petitioner now files the following as its assignment or specification of errors:

Petitioner complains that the following errors were committed by the United States Circuit Court of Appeals for the Eighth Circuit:

(1) The Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the District Court.

(2) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the respondent was entitled to $9.70 per ton for the 5,500 pounds of coal lost in transit.

(3) The Circuit Court of Appeals for the Eighth Circuit erred in refusing to enter judgment in this case on the basis of $5.75 per ton for the coal lost in transit.

(4) The Circuit Court of Appeals for the Eighth Circuit erred in applying to the coal lost in transit a market value disassociated from the carload of coal of which it was a part.

(5) The Circuit Court of Appeals for the Eighth Circuit erred in applying as a measure of damages in this case a market value which did not apply to the coal in car on track where petitioner was duty bound to deliver the same.

(6) The Circuit Court of Appeals for the Eighth Circuit erred in applying as a measure of damage the retail market value of the coal lost in transit.

(7) The Circuit Court of Appeals for the Eighth Circuit by its decision has allowed special damages when none are claimed, and in this the court has committed error.

Ultimate Question.

The ultimate question is whether, where a portion of an interstate carload shipment of coal is lost in transit, the "full actual loss, damage or injury to such property" for which the carrier is liable is—

(a) the market value of the coal *in the car* at the place where the carrier is obligated to make delivery; or

(b) the retail value of such lost portion delivered at the expense of the dealer to the purchaser at his place of business or home for consumption by such purchaser, which includes various items of expense such as unloading from car, sales to customers, reloading into drays or wagons, transportation to and delivery to customers, and business risks.

BRIEF OF ARGUMENT.

MAY IT PLEASE THE COURT:

This court, in the case of *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, settled the question as to what law applies to this case. It there said:

> "The Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, provides that the carriers affected by the act shall issue a bill of lading and * * * shall be liable * * * for the full actual loss, damage or injury."

It decided that notwithstanding the provisions of the bill of lading, the plaintiff was entitled to the value of the shipment "at the place of destination where it should have been delivered."

In that case, however, there was no question as to the amount of that value. Here there is. Although both parties agree that the market value at destination is the measure of damages, the respondent insists that the retail price governs, while the petitioner contends that the market value of the coal *in the car* at destination is the market value to be applied.

RECOVERY OF MARKET VALUE OF COAL IN CAR IS RECOVERY FOR FULL ACTUAL LOSS, DAMAGE OR INJURY.

It is apparent, however, from that decision that all the respondent can recover is an amount that will compensate him *"for the full actual loss, damage or injury"* sustained with reference to the loss of this coal in transit.

Obviously, that is the market value of the coal *in the car* at destination—$5.75 per ton. *The facts disclose that the duty of the petitioner with reference to this car terminated when it delivered the car of coal on this industry track.* (R. 10.) It was immaterial, as far as the pe-

titioner was concerned, whether or not anything was done with the coal by the respondent when so delivered, and nothing which respondent might do with it after such delivery could change its value at the time of delivery. Had the respondent sold the car of coal on the said delivery track at the market price, he would have received $5.75 per ton, whether the car contained 88,700 pounds of coal or only 83,200 pounds thereof.

If the *entire* car of coal had been *delivered,* it is agreed that the true destination *value* of the coal would have been $5.75 per ton. (R. 9.) If the *entire* car had been *lost,* it is agreed that the *value* of the coal "at the place of destination where it should have been delivered" would have been the same $5.75 per ton (R. 9) and that that would be the true and proper measure of respondent's "full, actual loss, damage or injury." The above is *conceded* by both parties.

Still respondent here claims the destination value of the coal was $9.70, which is *more* than $5.75 per ton,—*simply because a* PORTION *of the car, instead of the* ENTIRE *car, was lost in transit.*

If respondent's contention and the judgment entered by the Circuit Court of Appeals herein are right, the destination *value* of the same coal was *enhanced by the mere fact* that only a portion, instead of all, of the carload of coal was lost in transit. This fairly demonstrates the fallacy and fundamental unsoundness of respondent's position that the *market cost of replacement* is, here and always, the true test of value for assessing general damages in a failure to deliver or loss case. Market cost of replacement may, in a proper case, be one proper way of arriving at value, but it is an artificial and improper way where it results, as here, in a value considerably *in excess* of the conceded value of the same coal under circumstances different but without a distinction, and clearly *in excess* of the "full, actual loss, damage or in-

jury" sustained by respondent. It is not a proper way of arriving at value when it disregards the *quantity* shipped, and purports to value only a part thereof. (*Grand Tower Co.* v. *Phillips*, 90 U. S. 471; *Woods & Co.* v. *C. M. & St. P. R. Co.* 320 Ill. 341; *Wendnagel* v. *Houston*, 155 Ill. App. 664, 666, 667; *Smith* v. *N. Y. O. & W. R. Co.* 196 N. Y. S. 521.)

In the case of *Wendnagel* v. *Houston*, 155 Ill. App. 664, the court said at pp. 666-667:

> "There is evidence in the record which tends to show that when this lumber was sold in small quantities the price was higher than when it was sold in large quantities.
>
> The rule as to the measure of damages, where the question of *quantity* is involved as in the case at bar, is well stated in *Grand Tower Company* v. *Phillips*, 90 U. S. (23 How.) 471. It is there said: 'The true rule would seem to be, to allow the plaintiffs to show the price they would have had to pay for coal *in the quantities* which they were entitled to receive it under the contract. * * *' In *Bagley* v. *Findlay*, 82 Ill. 524, our Supreme Court, in the same connection held: *'If goods are bought in large quantities the market price at retail is not the standard, but the market price in large quantities.' James H. Rice Co.* v. *Penn Plate Glass Co.*, 117 Ill. App. 356, 362, is to the same effect. It is, of course, unnecessary to use either of the terms 'wholesale' or 'retail' in questioning witnesses on the subject of price. Indeed the use of either of these terms may lead to misunderstanding; for the quantity the examiner may have in mind as being wholesale quantity, may not be a wholesale quantity in the mind of the witness." *

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* We have quoted from that case because it cites, quotes from, and applies a decision of this court.

In the case of *Woods & Co.* v. *C. M. & St. P. R. Co.*, *ubi supra*, the Supreme Court of Illinois said (pp. 342-3):

> "Where, as in this case, there is no claim for special damage, the measure of damages is the market price of the goods at the place of destination, (*Northern Transportation Co.* v. *McClary*, 66 Ill. 233; *Sangamon and Morgan Railroad Co.* v. *Henry*, 14 Ill. 156); and this means the market price of goods of the kind specified, *in the* QUANTITY *which the buyer was entitled to receive under the contract.* (*Bagley* v. *Findlay*, 82 Ill. 524; *Grand Tower Co.* v. *Phillips*, 90 U. S. 471; *American Railway Express Co.* v. *Parisian Hat Co.*, ... Tex. ...., 240 S. W. 947). * * *"

If the market value of $5.75 per ton does not apply, then there is no evidence in the case as to the market value of the coal at destination. The retail price does not and cannot apply as it has reference only to coal (R. 9) "when delivered at the expense of the dealer to the purchaser at his place of *business or home for consumption by such purchaser*" and (R. 9) especially where, as here, "less than carload lots of coal had *not* been sold in said market and delivered to or into any *car on track.*"

This value of $5.75 per ton is the market value of the coal *in the car* at the place where the petitioner was duty bound to deliver it.* This court decided in the *McCaull-Dinsmore* case, *ubi supra,* that by stipulation in the bill of lading the value at any other place cannot be the measure of the damage. If the value at the place of origin, or at some place *short* of the place of delivery, is immaterial, why is not the value at some place *beyond* the place of delivery immaterial? We are insisting that the value *at* the place of delivery is the measure.

IF RESPONDENT BE PAID THE MARKET VALUE OF THE COAL IN CAR AT DESTINATION HE WILL BE COMPENSATED FOR LOSS OF WHAT HE WOULD HAVE HAD IF CONTRACT OF SHIPMENT HAD BEEN PERFORMED.

In the *McCaull-Dinsmore* case, *ubi supra,* this court said:

> "The rule of the common law is not an arbitrary *fiat* but an embodiment of the plain fact that the

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* In the case of *Lake Erie & W. R. Co.* v. *Fantz,* 154 N. E. (Ind. App.) 875, 85 Ind. App. 569, the court said that "the conclusion of law should have (been) based on the market value of the coal *on the car* at its destination at the time it should have arrived, deducting therefrom the freight charges."

> actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed * * *."

In the more recent case of *Hicks* v. *Guinness*, 269 U. S. 71, treating a different state of facts but giving application to the same principle, this court used this language (p. 80):

> "The loss for which the plaintiff is entitled to be indemnified is 'the loss of what the contractor would have had if the contract had been performed,' *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull Dinsmore Co.*, 253 U. S. 97, 100; *it happens at the moment when the contract is broken,* just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money *at that time.*"

Applying this language to this case: The contract on the part of the railroad company was to deliver this car of coal on the industry track of the respondent. When it failed to deliver *all* of the coal that was in the car on the said industry track the contract was *then* broken "and the plaintiff's claim is for the amount of *that* loss valued in money *at that time.*"

Using the language of this court in the *McCaull-Dinsmore* case, *ubi supra*—

> "The loss for which the plaintiff is entitled to be indemnified is 'the loss of what the contractee would have had if the contract had been performed.'"

The respondent would have had exactly 5,500 more pounds of coal *in the car* when it was delivered on the industry track "if the contract had been performed" and "the plaintiff's claim is for the amount of *that* loss valued in money *at that time.*"

This court has held in the case of *Southern Pacific Co.* v. *Darnell Taenzer Co.*, 245 U. S. 531, that the court does

not go beyond the first step or concern itself with consequences which are remote. That is what we are contending for in this case.

This court there said (pp. 533, 534):

> "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and *it does not inquire into later events.*"

It was also said by this court in the case of *United States* v. *New River Collieries,* 262 U. S. 341, at pp. 343, 344:

> "The owner was entitled to the full money equivalent of the property taken, *and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken.* * * * *More would be unjust to the United States and less would deny the owner what he is entitled to.*"

There is no controversy in this case but that if the 5,500 pounds of coal which were lost in transit *had been delivered* with the rest of the coal *in the car,* it would have been worth $5.75 per ton. That being true, it would seem to follow that the only thing that the plaintiff lost was 5,500 pounds of coal, which, had it been delivered in accordance with the contract of carriage, would have been *in the car* at the place of delivery and would have been worth $5.75 per ton. Paraphrasing the language of this court in the *New River Collieries* case, *ubi supra,*— "more would be unjust to the petitioner and less would deny the respondent what he is entitled to."

The respondent did not buy this coal separate and apart from its being a part of the carload of coal. *The respondent did not buy any particular quantity of coal.*

He bought a carload of coal which happened to contain so much coal. A portion of it was lost. The respondent would have bought the car of coal had the coal which was lost not been in the car at the time he bought the carload of coal. (R. 10.) Had it been delivered as a part of this carload it would have been worth $5.75 per ton. The other coal in the car was worth $5.75 per ton and this coal would have been worth the same.

MEASURE OF DAMAGES IS DIFFERENCE BETWEEN MARKET VALUE OF CAR OF COAL DELIVERED IN ACCORDANCE WITH CONTRACT AND MARKET VALUE OF THE CAR AS IT WAS IN FACT DELIVERED.

The correct measure of damages is *the difference* between the market value of the carload of coal had it arrived with all the coal in it, and the market value of the carload of coal as it did arrive with the 5,500 pounds of coal missing. (*Barry* v. *Los Angeles & S. L. R. Co.*, 189 Pac. 70; 56 Utah 69.)

Having in mind that in this case, as customarily, the unit value of the carload as called for by the contract was the same as the unit value of the carload delivered, both being *carload* quantities, and having in mind that the purpose of the law of damages is to give the contractee the money equivalent of the thing lost,—and no more than compensation for the loss,—the value of the thing lost, *i. e.*, of part of the carload shipped, should be determined and computed by taking *the difference between carload values.* This method of computation of the amount of plaintiff's loss in a case of this kind is consistent with the rule of measure of damages laid down by the courts in cases of damage to goods in transit, and

gives respondent the advantage and benefit of his transportation contract,—for his loss is measured on the basis of destination market value,—*and also* meets all the requirements of the rule of damages for breach of contracts generally,—for respondent is in fact put in the position pecuniarily in which he would have been if the carriage contract had been fully performed.

And, moreover, the net result of the method of computation here urged by the petitioner is that the respondent is actually made whole and receives full compensation for his full actual loss.

This method of computation is, furthermore, consonant with the common sense of the situation. Respondent was entitled, under his carriage contract, to receive at Minneapolis a carload of coal admittedly of the destination market value of $255.02. That is what he would have received but for petitioner's breach. Respondent actually received at Minneapolis a carload of coal admittedly of the destination market value of $239.20. That is what he did receive. The difference, *i. e.*, what respondent did not receive, is what respondent lost. That difference is the measure and extent of respondent's loss, —of "the full actual loss, damage or injury * * * caused by * * * such common carrier." The amount of such loss in this case is $15.82, payment of which, with interest, will fully compensate plaintiff. That is the amount for which we asked the court to enter judgment.

Reference to the acknowledged and accepted method of computing damages in other common carrier cases is, we believe, helpful in testing the fundamental soundness of the method here urged.

In cases of *damage* to a carload of, for example, perishables, where the carrier's breach consists of failure to

transport the shipment safely, the measure of damages and rule of computation thereof are generally stated by the courts to be the *difference* between the fair, reasonable destination value of the carload in the condition in which it should have been delivered, *i. e.*, undamaged, and the fair, reasonable destination value of the carload in the condition in which it was delivered, *i. e.*, in a damaged condition. In such cases plaintiff's "full actual loss, damage or injury" is invariably and properly computed by taking the *difference* between *carload* values, *as such.* (*Gulf, Colo. Etc. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 37; *New York, Etc. R. R. Co.* v. *Estill*, 147 U. S. 591, 616-7.)* Destination market values are of course used when they exist; otherwise fair, reasonable values are used.

The same measure and rule of computation are generally adopted and used in figuring a claimant's loss or damage resulting from *delay* of a carload shipment. (*Peterson* v. *Case Rec.* 21 Fed. 885, 891.) In such cases the generally accepted rule is stated to be the difference between the fair, reasonable destination value of the carload at the time when it should have been delivered under the contract, and at the time when it was in fact delivered by the carrier. There, likewise, the amount of a claimant's loss or damage is computed by taking the *difference* between *carload* values, *as such.*

Unless, therefore, there is some inherent difference or distinction, recognizable in the law, between perishables

* In the Estill case this court said (pp. 616-617):

"The measure of damages was properly stated by the court in its charge to the jury. The difference between the market value of the cattle, in the condition in which they would have arrived but for the negligence of the defendant, and their market value in the condition in which, by reason of such negligence they did arrive, constituted the proper rule of damages. (Citing cases.)"

and coal, or between damage to part of a carload and loss of part of a carload,—which difference or distinction we urge does not exist,—no *fundamentally* different rule of damages or rule of computation thereof should be applied in the case at bar. As already pointed out, the rule of damages and computation thereof in damages and delay cases is by the courts *expressly stated* to be the difference between carload values. The rule in loss cases, generally *expressed* by the courts as being in substance the fair, reasonable destination value of the things lost, has, we submit, come generally to be used as a *short and convenient expression* of the real rule in such cases,—"to avoid multiplicity of words," —that a claimant's loss is *fundamentally* the loss of a *fractional part of a carload,* and that the amount of his loss should be *computed as such.*

The fundamental thing in all breach of contract cases is not that plaintiff be paid the *value* of what is not delivered or lost, but that he be *made whole.* The *primary* thing is compensation to him for his loss; the *secondary* thing is the value of what was lost. The latter is only one method of arriving at the former. It is only a means to an end,—compensation and no more; and if applying the means reaches an unjust end, the wrong means must have been adopted. With all due respect to the Circuit Court of Appeals, petitioner respectfully insists that that is just what has happened here; primary things have been overlooked in the consideration of secondary things, and words have prevailed over fundamentals.

RESPONDENT IF ALLOWED TO RECOVER MORE THAN MARKET VALUE OF COAL IN CAR WILL BE MORE THAN COMPENSATED FOR LOSS SUFFERED.

The parties have here stipulated that the market value of this coal *in the car* at the industry track, where under the contract it was to be delivered, was $5.75 per ton, —the freight being eliminated. The petitioner is willing to pay that and that is all it should be compelled to pay. It should not be made to pay anything more than the Act of Congress requires.

This case is but a case of a breach of contract and the damages are those which will compensate for the "full actual loss, damage or injury to such property."

This court in the case of *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540, defined the consequences of a breach of contract and the damages resulting therefrom. This court said (p. 543):

> "When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured. The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage* v. *Genning*, 1 Roll. R. 368; *Hulbert* v. *Hart*, 1 Vern. 133. It is true that as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. *The extent*

of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind."

In the case of *Wehle* v. *Haviland*, 69 N. Y. 448, 451, this language is found:

"It is well settled that in actions for the conversion of goods, or for the nondelivery of goods or chattels upon contract, unearned and speculative profits will not be included as a part of the damages to be recovered. (Citing cases.)

The retail value or the price at which goods are sold at retail includes the expected and contingent profits, the earning of which involves labor, loss of time and expenses, supposes no damage to or depreciation in the value of the goods, and is dependent upon the contingency of finding purchasers for cash, and not upon credit, within a reasonable time, the sale of the entire stock without the loss by unsaleable remnants, and the closing out of a stock of goods as none ever was, or ever will be closed out, by sales at retail at full prices.

By the allowance of these unearned and uncertain profits, and also the allowance of interest from the time of the conversion the plaintiff recovers the profits which she had hoped to make in the future, and interest upon the profits, as well as upon her investment. The plaintiff was entitled to compensation, and that consisted of the market value of the goods, their cost, or what they would have cost in the market and interest thereon, and nothing more. The retail profit was not included in the compensation to which she was entitled."

This language applies here. If this judgment be allowed to stand the respondent will recover of the petitioner speculative damages in addition to the "full actual loss, damage or injury to such property." He will be allowed to recover all the "expected and contingent profits the earning of which involves labor loss of time and expense," none of which he has paid or incurred.

If he be entitled to them why is the freight of $3.30 not also included? It is a part of the $13 retail price (R. 9) and it also has *not* been paid. Yet the court did not include it. It is no answer to say that the freight charges on the lost coal were not paid or incurred by respondent, for, likewise, the other expenses,—for which respondent is allowed reimbursement in recovery of retail market value,—were not paid or incurred by the respondent to the petitioner or to anyone else.

In addition if the judgment be allowed to stand it will permit a recovery on the theory that the respondent purchased or was obliged to purchase 5,500 pounds of coal in the open market at Minneapolis at $9.70 per ton to replace that lost, whereas the stipulated facts are that the respondent purchased no other coal destination to replace the lost coal, but that he did purchase coal in carload lots from time to time to replenish his stock in the usual course of business at $5.50 per ton; that he lost no sales by reason of the shortage of the 5,500 pounds from the shipment in question. Consequently his full actual loss, damage or injury is in the sum of $5.75 per ton of the quantity lost. He not only did not lose more than that and did not buy coal at $9.70 (or $13 to be correct) to take the place of the coal lost, but he in fact bought coal at $5.50 to take its place.

Under these circumstances the decision of the Circuit Court of Appeals allows respondent *more* than compensation for his loss. Such decision we insist cannot be right.

Cases Deciding Question Involved.

In order that the court may have a ready reference to the cases purporting to decide the question involved, and in order to bring forcibly to the attention of the court the

distinction existing between this case and those apparently holding against our contention, we desire to quote from the opinion filed by Judge Cant when deciding this case in the District Court, which splendidly presents this distinction. Judge Cant said (R. 37-39):

"At the time this case was first decided the one case, which, *arguendo,* most strongly and directly supported plaintiff's claims was *Heidritter Lbr. Co.* v. *Central R. Co.* (N. J.) 122 Atl. 691, 692. Since then, to the same effect, has been decided the case of *Leominster Fuel Co.* v. *New York, N. H. & H. R. R. Co.* (Mass.) 154 N. E. 831. The latter case rests on the authority of the Heidritter case, and the decision by the Court of Appeals in the case at bar. *In both the Heidritter case and the Leominster case, the most distinguishing and controlling feature of the case at bar was entirely absent.* Reference is now made to the *value,* established by agreement of the parties, which the coal in question would have had *in car at destination* if delivery had been made as agreed. This feature was not sufficiently stressed by this court in its earlier opinion.

In the *Heidritter* case it was said that 'the real question at issue is whether the plaintiff was entitled to recover the *retail* value *at destination,* rather than the *wholesale* value *at the point of shipment.*' p. 691. In the *Leominster* case the alternative allowed by the evidence was the *cost* of the coal *at the mine, plus freight,* which defendant claimed was the true basis of recovery, and the *retail price* of such coal at the yards of dealer, or such price delivered in plaintiff's yard. Plaintiff claimed a recovery on the latter basis and such claim was allowed. In both cases it was held, in effect, that the plaintiff should recover on the theory that he had a right to go into the local market and replace the lost commodity by purchase at retail, which theory, for the reasons hereinbefore set forth should not be conceded. It will be observed that each of these two cases are within a much narrower compass than the case at bar.

"• • • It is believed that aside from the decision by the Court of Appeals, the two cases above cited are the authorities which tend most directly to support

plaintiff's views. Aside from the Heidritter case, the authorities cited in the decision of the Court of Appeals in support thereof, in the main, are content with announcing the general rule. The Yazoo case therein cited will be later referred to. The case of *Cutting et al.* v. *Grand Trunk Ry. Co.*, 13 Allen, 381, also cited, was a case of replevin for a quantity of flour which the defendant had refused to deliver until certain charges thereon claimed by defendant should be paid. The court states the rule for the measure of damages in cases such as this, pp. 384, 385, and in connection with the discussion as to the measure of damages where there has been a delay in the delivery of goods, and a fall in the market value meantime, makes the statement quoted in the decision of the Court of Appeals herein. That excerpt and the decision throughout rests on the general statement of the value, or the market value of the goods at destination. The discussion goes no further. Profits are disallowed, p. 386, and at p. 387, it is said: 'Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods.' The general effect of this would be to hold plaintiff here to the *value in the car.* We, however, are asked to go much further than the allowance of profits. We are asked to allow and pay plaintiff for expenditures which he does not make, and for services which he does not render, and for risks which he does not take.

In opposition to the claims of plaintiff are a considerable number of cases which decline to adopt the retail market value as the measure of damages in cases such as this. They do not all employ the same reasoning, nor reach precisely the same results, but are all agreed in rejecting the retail price standard.

Brown Coal Co. v. *Illinois Central R. Co.*, 196 Iowa, 562, is a carefully considered case. If the foregoing views are correct, the court there should have allowed a recovery based on the value of the coal in the car at destination. There is some ground for urging, however, that there is no clear evidence of such value.

Yazoo & M. V. R. Co. v. *Delta Grocery & Cotton Co.* (Miss.) 98 So. 777, was an action to recover the value of certain flour lost or damaged in transit. It is there stated that 'the exact point in controversy

is whether the appellee, a wholesale grocer, is entitled to recover * * * the invoice or cost price, plus freight,' of the damaged flour, 'or the resale value, (that is the price at which the flour could have been sold, or, as we will say, the reasonable cash market value) at the point of destination.' p. 777. * * * 'The damaged flour cost plaintiff $10.44 per barrel delivered at Clarksdale. Plaintiff recovered $11.30 per barrel for the damaged flour, which represents what plaintiff could have sold the flour for, or its reasonable wholesale cash market value at the point of destination.' This wholesale cash market value is what defendant contends for here as the proper measure of recovery.

H. T. Cottam & Co., Inc. v. *Illinois Central R. Co.*, 3 La. Court of Appeal Reports, 240, was decided in October, 1925. The case was presented in such a way that contemplated profits occupied an important place in the case. These were disallowed and plaintiff held to the original cost of the merchandise, plus freight.

In *Central Georgia R. Co.* v. *American Coal Co.*, 28 Ga. App. 95, certain coal was lost in transit from a carload shipment. Plaintiff was limited in its recovery to wholesale price at point of destination.

For further cases which decline to adopt the local retail price as the measure of damages in such cases, see the following authorities:

Chicago, R. I. & P. R. Co. v. *Broe*, 16 Okla. 25.

Texas & Pac. R. Co. v. *Payne*, 15 Tex. Civ. App. 58.

State v. *Smith*, 31 Mo. 566.

Cincinnati, N. O. & T. P. R. Co. v. *Hansford*, 125 Ky. 37. In this case the evidence showed that the lost goods cost $317, and that if they had been received and sold at retail, a profit of $105.66 would have been realized thereon. There was no evidence as to what their value would have been at destination, or that it would have been more than the cost price. On that ground, as stated in the opinion, a recovery was limited to $317, and the prices at retail were disregarded.

Quanah A. & P. Co. v. *Novit* (Tex. Civ. App.) 199 S. W. 496."

In the case of *Brown Coal Co.* v. *Ill. Cent. R. R. Co.*, 196 Iowa 562, the court cites a great many cases which show that we are right. We respectfully ask careful consideration of that case by this court. It is true the court there allowed the plaintiff for a portion of a carload of coal lost in transit the fair market value thereof as a part of the carlot at the initial point of shipment, plus freight thereon if paid. That was done fully recognizing that the plaintiff was entitled to the market value at destination, but there was no evidence of that value in that case other than that, as there is in this case.

Opinion of District Court.

The question has been so well discussed by the District Judge in the opinion filed by him that we have taken the liberty of attaching hereto as an appendix to this brief a copy of that opinion. District Judge Cant therein admirably sets forth the law as we contend it is.

Conclusion.

We submit for all these reasons that the Circuit Court of Appeals for the Eighth Circuit should have recognized that the law was properly stated in the opinion of the District Judge and should have reversed the judgment of the District Court instead of affirming the same, and that in consequence the judgment entered by the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX.

OPINION OF THE JUDGE OF THE UNITED STATES DISTRICT COURT RENDERED AT THE TIME THE JUDGMENT INVOLVED IN THIS CASE WAS ENTERED. (R. 20-39.)

MEMORANDUM.

This is an action brought by the consignee of a carload of coal against the railroad company which had undertaken to transport the coal. The amount of the shipment was 88,700 pounds. Of this amount 5,500 pounds were lost in transit. The destination was Minneapolis, Minnesota, and the delivery was on an industry railway track running alongside of or into plaintiff's coal yard at that place. It is agreed that at the time and place of delivery, coal of the kind here in question was worth $5.75 per ton, plus freight, in carload lots of from 60,000 to 120,000 pounds. It is also agreed that the same kind of coal at retail in the Minneapolis market, at the time in question, delivered at the place of business or home of the consumer, was worth $9.70 per ton, plus freight. Plaintiff claims that he is entitled to recover at the rate of $9.70 per ton for the coal which was lost. Defendant admits liability, but claims that the amount of recovery should be limited to $5.75 per ton. No freight was paid on the coal which was lost and that item may be eliminated from the discussion. The facts were presented to the court originally by stipulation and the opinion of this court thereon is found at 2 Fed. (2d) 287. That case was reversed by the Circuit Court of Appeals and the opinion thereon is found at 13 Fed. (2d) 459. The appellate court there held that a recovery should be had on the basis of $9.70 per ton. Thereafter the stipulation of facts was amended and amplified and with the stipulation so changed the case was again presented to the court on a second trial. This court is not satisfied that the amended stipulation of facts justifies the conclusion that the case has been substantially changed. Following the decision of the Court of Appeals, therefore, it is the duty of this court to allow a recovery at the rate of

$9.70 per ton for the coal which was lost, and this will be done.

The case, however, is of rather unusual interest and importance. It is assumed that it is not inconsistent with the fullest measure of respect for the Appellate Court, to offer further suggestions in the interest of justice upon the question involved. It is for this court to follow the decision of the Appellate Tribunal, but that Tribunal itself may at some time wish to re-examine the matters which are here in controversy. It is in that light and for that purpose only that the suggestions which follow, are made.

The case at bar is the ordinary case of a commodity purchased in bulk for the purpose of selling the same again at an advance, if possible, but without any necessity or occasion for going into the local market to replace any portion or the commodity which might be lost in transit. Under the circumstances hereinbefore set forth, as amplified by the stipulation of fact, what is the measure of damages in this case? Is plaintiff entitled to recover at the rate of $5.75 per ton, or at the rate of $9.70 per ton for the coal which has been lost?

Basically, the case is one for the recovery of damages for breach of contract. This particular controversy belongs to a sub-class of breach of contract cases. It involves a breach by a common carrier of its agreement to transport and deliver freight. The same general rules apply here as in all other cases of breach of contract. It will be seen that certain subsidiary rules are specially applicable. The difficulty in such cases arises in estimating the amount of the loss which the plaintiff has sustained. The courts have said that in this connection each case must be governed by its own facts. *Mangin* v. *Dinsmore,* 62 N. Y. 35. *Magdeburg General Insurance Co.* v. *Paulson,* 29 Fed. 530, 532. This does not mean that the cases are beyond the rules. They are not; it is at this point that the subsidiary rules intervene.

In the former opinion of this court certain outstanding features of the case were not made sufficiently clear.

1. Cases of the character here in question fall into certain groups or classes, and rules which apply to one class quite often do not apply to another. A classification upon one basis is as follows:

a. Cases where general damages only are involved.

b. Cases where special damages are claimed.

Upon another basis the classification may be as follows:

a. Cases where the consignee is under no necessity or compulsion to go into the local market and purchase commodities with which to replace those which have been lost.

b. Cases where by reason of special circumstances the consignee is under some reasonable compulsion to replace the lost commodity by purchasing in the local market.

There are doubtless other classifications of less importance.

The classifications above specified may very nearly duplicate each other. That is, all cases where there is no necessity of replacing the lost commodity would generally fall under the head of general damage cases; and very generally cases where the lost commodity must be replaced would fall under the head of special damage cases, but the distinguishing features of both classifications are important, because sometimes one basis of classification is emphasized by the courts and sometimes another, and because collectively they furnish the bases for the various rules which are announced; which rules, as applied to a particular situation may be quite correct, but which if applied to a different set of facts may work an injustice.

2. The fundamental rule in all cases involving damages for breach of contract is that the damages recoverable are such only as, in theory of law, may fairly be said to have been within the contemplation of the parties when the contract was made.

17 C. J. 742-746, Sec. 76.

Harvey v. *Conn. & Passumpsic R. R.* 124 Mass. 421, 423-4.

By the expression "general damages" is meant such damages as follow naturally and in the usual course of things from a breach of contract. In all ordinary cases it is general damages only which are held to have been within the contemplation of the parties. In such cases the question is what is the immediate loss without going beyond the first step.

17 C. J. 712, Sec. 20.

17 C. J. 742, Sec. 76.

"Special damages" are such as do not follow naturally or in the usual course of things from such a

breach, but are such as arise out of unusual or special circumstances. Such circumstances, however, give rise to no claim for additional or special damages on account thereof, unless the circumstances were known in advance by the respective parties, and unless the consequences of the breach and loss under such circumstances were known to and in contemplation of the parties when the contract was made.

17 C. J. 712, Sec. 76.
17 C. J. 746, Sec. 77.

3. In this case plaintiff sues for general damages only. There is no allegation of special damages in the complaint and no proof thereof in the stipulation of facts.

Here, if the fact is at all important, there is no claim or proof that, prior to the loss in question, defendant had any knowledge that the coal was being purchased for the retail trade; and the circumstance of such intended use appears, if at all, only as a matter of inference from the stipulated facts.

4. In cases such as the one at bar, therefore, where general damages only are claimed, a recovery for proximate loss only can be had,—a loss which follows naturally and in the usual course of things from the breach of contract. This is an unvarying rule to which there are no exceptions. With subsidiary rules there may be variations or exceptions. In such cases as this the court does not go beyond the first step, nor concern itself with consequences which are remote. *Southern Pacific Co.* v. *Darnell-Taenzer Co.* 245 U. S. 531, 533. The question is what loss plaintiff had sustained at the moment the car of coal was switched into his yard, with the 5,500 pounds missing therefrom. It is not what loss might be figured out at a later time under entirely new and different conditions. Plaintiff's cause of action accrued at once upon failure to deliver and without waiting for later events. *Southern Pacific Co.* v. *Darnell-Taenzer Co. supra,* p. 534. It made no difference whether the coal was to be sold at wholesale or at retail, or was to be consumed by plaintiff himself. The proximate loss "is the loss of what the contractee would have had if the contract had been performed." *Chi. M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.* 253 U. S. 97. In this case that would have been the 5,500 pounds of coal in the car, which amount of coal at the time of delivery, was missing therefrom.

5. A subsidiary rule, applicable in cases of this character, is that plaintiff is entitled to recover the value of the commodity which has been lost, as that value would have been at the time and place of delivery if delivery had been made as agreed.

This rule is more elastic. In its application it does not always mean the same thing. Courts are often content with announcing the general rule without discussion as to its application. In various cases there is no difficulty about such application. In other cases the difficulty is very real. In various cases, as will be seen, this rule does not apply at all in any literal sense and would provide no adequate relief.

In the case at bar, the broader, general and controlling rules must constantly be kept in mind; the plaintiff is entitled to be made whole. He is not suing for coal, but for money. He is entitled to the money equivalent of that which has been lost. There is no occasion for punishing the defendant by allowing excessive damages. There is no occasion for allowing plaintiff to realize a gain out of the transaction. He is not to receive a reward. He is to receive fair and reasonable compensation for his loss.

6. An unusual and outstanding feature of this case is the fact agreed upon, as to the value which the missing coal would have had at the time and place of delivery, if it had been delivered as agreed. There is no such element in the cases relied upon by plaintiff. Here it is agreed to and is one of the settled facts in the case, and is beyond controversy, that if the coal which was lost had not been lost, but had been delivered to plaintiff with the other coal in the car, its value in such car at destination in plaintiff's yard would have been $5.75 per ton. This value so agreed upon must be understood to be the true value in the car at the time and place in question for any and all uses to which the coal might be put.

If plaintiff had received the coal in question, he would have had in his possession a commodity which all agree was of the value of $5.75 per ton. If he had it not, he obviously, so it may be urged, sustained a loss in that amount per ton on account of that which had been lost. The carload of coal, when it reached plaintiff's yard, was worth that much less than it would have been if

none had been lost. We are enabled to determine the amount in this particular case, because here we have the unusual experience of being provided with data showing value at the immediate time and place of delivery. If the car had been delivered intact, the coal therein would have been worth $255.0125. As actually delivered, with the lost coal out, it was worth $239.20. This is all agreed to. There is no cavil about it. The difference of $15.8125 would ordinarily be regarded as the loss which plaintiff must have sustained. This would be stopping at the first step, without inquiry into later conditions which might arise or develop, and without considering whether the coal was to be sold at wholesale, or at retail, or was to be consumed by the consignee.

7. Notwithstanding the foregoing considerations, it is urged by plaintiff that even in such a case as this, where we know the value of the coal at destination, the plaintiff is entitled to recover, not that value, but a considerably greater amount, represented by the retail selling price of such coal at such place. The reasons assigned are

a. That if plaintiff had received the coal according to agreement, he could have sold it at the retail price; and

b. That if plaintiff had wished to replace the missing commodity, he would have been obliged to pay the retail price at destination for the coal which he would purchase.

These reasons may be considered in their order.

(a) The value per ton in the car, $5.75, allows plaintiff an advance of $.25 per ton over the mine price. Some, or all of this is profit. That is included in the proximate loss which the plaintiff sustained through non-delivery. In this respect the case is similar to *Chi. M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.* 253 U. S. 97, where the advance was somewhat over $200. on an entire carload of wheat which was lost. No retail prices were involved in the McCaull-Dinsmore case. The spread between this value of the coal in the car, and the retail price thereof, all at destination, is $3.95 per ton. But a large part of this is absorbed in the operation of retailing. The coal must first be unloaded from the car. It must then be sold to some customer. It must next be reloaded into trucks or wagons, and then transported perhaps several miles to the place of business or home of the consumer, and there delivered to him. The stipulation of facts is to the effect that it is only after all this has been done that the $9.70 per ton can be realized. Along therewith there has

been the overhead expense, the insurance, the making of collections, the risk of and allowance for bad debts, and the directing services of the plaintiff himself. We know that the aggregate of these items amounts to a considerable sum per ton. The plaintiff has not advised us thereof in detail. To get his $3.95 per ton, he is obliged to pay out a good part thereof in the course of the retailing operation, and besides must render or provide proper supervision as well. We do not know the amount of the net profit. It must be a rather modest sum. In any event, such profit, no doubt, bears some proper relation to the original cost of the coal and to the risks which are assumed and the expenses which are incurred and the considerable service which is rendered in connection with the retail trade. The $3.95 per ton is the sum of legitimate and necessary additions to the carload price, which must be made in connection with the retail operations in order that those operations may be successfully carried on. All this, however, is remote from the time, place and circumstances which should determine the amount of plaintiff's proximate loss. By the decision in this case we are awarding plaintiff $3.95 per ton over the carload price. This is much better for him than to have received the coal. He gets the full retail price without any risk or expense and without the work of any retail operations whatever. Had he received the coal, it is hardly possible that he could have realized net thereon, above cost and above the necessary expense of the retail operations, more than from $1.00 to $1.25 per ton. As to the figures, this is in part speculation, but necessary speculation, in as much as accurate information has not been adduced by the contending parties, but no matter what the precise figures may be, the conclusion must be the same,—that looked at from the standpoint now under consideration, the award is substantially in excess of any legitimate loss which the plaintiff has sustained. In the face of many authorities against the allowance of profits in such cases, it is barely possible that net profits at retail might be allowed here, but that would be in violation of the rule limiting the recovery in such cases to damages for the proximate loss, and in any event, we have no definite information as to what the profits would have been. It is quite clear that the considerable amount per ton necessarily expended in carrying on the retail

operations could not, upon any legitimate theory, be included in the recovery here.

In 4 Sutherland on Damages, 4th Ed. Sec. 1098, p. 4178, the rule said to be applicable in such cases, and which is frequently quoted by the authorities, is stated as follows:

> "The retail price of property held for sale is not the standard by which its value is to be determined. Where a quantity of merchandise is sued for, the retail price would be unjust, for the merchant in fixing that price takes into consideration, not only the first cost of the goods, but store rent, clerk hire, insurance and probable amount of bad debts, and adds to all these a percentage of profit. This must be understood of a considerable quantity, not of a single article."

In theory of law, and presumably as a matter of fact, it was as advantageous to plaintiff to sell this coal at $5.75 per ton in the car, as it would have been to sell the same coal at $9.70 per ton at retail. The former price allowed a reasonable advance over the mine price, considering the risks assumed and the service required in connection therewith; the latter allowed a reasonable advance, we may assume, over the cost of the coal and the necessary risks, expense and service in connection with the retail operations. Looking forward to selling the coal at retail, or to making any other use thereof, it was worth in the car the sum of $5.75 per ton and no more. After the lapse of some period of time and under changed conditions, and after the expenditure of considerable effort and the incurring of considerable expense, plaintiff might have sold the coal for the gross sum of $9.70 per ton. Does that fairly measure his proximate loss on account of the non-delivery thereof?

(b) Another reason assigned for recovery here on the basis of the retail price per ton, is that if plaintiff would have been obliged to pay the retail price therefor. Inferentially it is assumed in such claim that plaintiffs have the right in all such cases to go into the market and buy at retail for the purpose indicated. Such statement of the rule has crept into the law and has been given a somewhat general application, because in some of the earlier cases and in various other cases since, the circumstances have been such that the claimant had the

right to go into the market and replace the commodity which had been lost. This was sometimes in the wholesale market, and sometimes in the retail market, depending upon the character and amount of the goods which had been lost.

In determining the amount of damages in any case where general damages only are claimed, it is the proximate loss with which we are concerned. In all such cases the carrier is bound to pay the value of the goods as such value would have been at the precise time and place of delivery, under conditions there contemplated, if the delivery had been made as agreed. If we have means agreed upon for the ascertainment of that value, as we have here, without resorting to retail prices, then we are not specifically concerned with the latter. The value in the car and the cost of replacement might be two very different things. If we were dealing with carloads of wheat, or cotton, or flour, or lumber, or coal, such value and the cost of replacement would be the same. In such cases courts have sometimes said that the consignee is entitled to recover such sum as would enable him to go into the market and replace that which had been lost. That happened to be true with respect to carload lots, only as the result of a coincidence. Such are ordinarily cases without special damages, and the ordinary rules apply. The consignee in such cases is entitled to recover the amount of his proximate loss. But in such cases the value per unit of the carload which has been lost is the same as the value per unit of another carload of the same commodity at the same place; the proximate loss and the cost of replacement are the same; and so the statements of the courts above referred to, though literally correct, are misleading if given a more extended application. The statements are true as to that particular class of cases.

There are other classes of cases where such general statements are made by the courts and are then lifted bodily, as it were, and given a broader and inaccurate application elsewhere. We are here concerned with and are speaking of the typical case of general damages,—such as follows naturally and in the usual course of things from the breach, and with values at the precise time and place when and where delivery should have been made,—not at some other time or place. By way of contrast and

illustration it is not wholly improper to refer to some of these other classes and to the statements of the court made in reference thereto. In this connection there are the unusual cases of various kinds where under special circumstances, on failure to deliver, the consignee is under some reasonable compulsion to go into the market and purchase at retail. In all such cases his actual loss is measured by the amount he is required to pay. This may occur with reference to many articles or commodities which may be necessary for the daily requirements of the consignee in his private life, or in his occupation or business, and where, if goods purchased do not arrive, he must go into the market and supply them otherwise; or it may be a case where he has already sold the commodity in advance and where he must go into the market to purchase that with which to make up the exact amount which he has lost. All these, however, are usually cases of special damages which require special pleading, and, properly, should be dealt with along those lines, although this point is not always made. *Vanderbilt* v. *Ocean S. S. Co.* 215 Fed. 886, 890. Here again, courts may make the general statement that in case of loss in transit the consignee is entitled to recover such sum as will enable him to go into the local market and replace the commodity by a purchase at retail. Such statement, made in general terms, may be correct as applied to the particular case there in hand, but, it may be urged, is incorrect when extended to a case where general damages only are involved. It will be observed, however, that in all these cases of special damages the consignee obtains no advantage and realizes no profits on the transaction; and the defendant is not mulcted in damages, arbitrarily or unnecessarily, but is required to pay such an amount only as will make the plaintiff whole.

Again, there are the cases where general damages only have been sustained, but where there is difficulty in fixing values as of the time and place of delivery. In such cases it is sometimes necessary to resort to values at the time and place of shipment and therefrom, as nearly as may be, to estimate the value at destination. *Northern Commercial Co.* v. *Lindblom,* 162 Fed. 250, 255. *The Arctic Bird,* 109 Fed. 167, 175. Sometimes it is necessary to resort to retail prices at destination and therefrom, as nearly as may be, to estimate values in bulk

or otherwise at that place. And sometimes, in cases involving single articles, or under unusual circumstances, the retail price at destination is the substantially correct measure of value of the lost article or articles at that place. The question of value at destination is always a question of fact, and it must be determined as other questions of fact are determined, upon the best evidence available for that purpose. In such cases again, courts sometimes make general statements which give trouble when applied in other cases. It is clear, however, that in cases where the value at destination is agreed upon and is a settled fact, the troubles respecting these matters of evidence do not obtrude.

There was no necessity, occasion or advantage here for the plaintiff to go into the local market for the purpose of purchasing coal with which to replace that which had been lost. There is strong ground for urging that a consignee of commodities in case of their loss in transit has no absolute or universal right to go into the local market at the point of destination and purchase goods at retail, with which to replace that which has been lost. He may do this only to the extent which may be reasonably necessary to protect his rights,—not the sentimental right of having a thing at all hazards because he has bargained for it, and this without regard to the rights of others, but his substantial rights and interests. He should not be permitted to purchase at retail when this places an excessive burden on others and does himself no good. He may not insist on this one burdensome method of adjustment, when other methods, quite as favorable to himself, and less harsh to others, are equally available. He should not be permitted to mulct the carrier in an amount in excess of what he has actually suffered. To do so would work an evident injustice. The carrier has some rights, as well as the consignee.

In cases such as this, involving the loss of part of a shipment of a considerable quantity, all to be resold, (and these features are mentioned, not to create a separate class, but because a case of this character serves well as an illustration and covers the case at bar), and where general damages only are involved, it may fairly be said, from what we know of human conduct, not only that the consignee is not obliged to go into the local market and buy, but, more than this, that he never does such a thing, does not wish to make any such purchase, and

will not do so unless under some form of compulsion. Moreover, if in this case plaintiff had purchased at retail and had paid $9.70 per ton and had placed his coal in the car to take the place of that which had been lost, the coal so purchased at retail would have been worth $5.75 per ton in the car, and no more. If we compel defendant to reimburse plaintiff on account of the supposed new purchases, we require it to pay $9.70, so that plaintiff may have $5.75. Again, by establishing the rule prayed for by plaintiff, we make assurance doubly sure that under the circumstances here involved, no consignee will ever make a purchase at retail. Such an award as he asks, places him at a substantial advantage over the position in which he would be if he should go into the market and buy. If he should actually buy, he would then have the coal on his hands and would be obliged to sell the same again, either at wholesale, or at retail. If he should sell at wholesale, he would receive $5.75 per ton for the coal. If he should sell at retail and should succeed in making collections he would finally realize the comparatively small amount of profit which the retail business affords; but we are giving him a sure net profit of $3.95 at the outset above the value of the coal in the car, and are relieving him of all care, annoyance, expense and risk of the retail trade in connection therewith. No one would be so stupid as to buy and handle the coal under such circumstances. We have a sure guaranty that he would not. He would keep the money.

8. The stipulation of facts states that all sales of coal of the character here in question, of less than 60,000 pounds, in the local market at the time and place in question, were considered sales at retail. It is further stipulated that the retail market price of 5,500 pounds of such coal at such time and place was $9.70 per ton. The stipulation does not specify the retail price of quantities of such coal weighing more than 5,500 pounds and less than 60,000 pounds. Drawing upon the current fund of general information for purposes of illustration, we may readily conclude that the retail price holds good for all quantities sold at retail. It is common knowledge that this is so, or that the variation is very slight. A man who buys 5,500 pounds or 2¾ tons of coal, at retail, pays the same price per ton as the man who buys 55,000 pounds, or 27½ tons. As already indicated, the value of the entire carload of coal delivered in plaintiff's yard in

Minneapolis, if none had been lost, would have been $255.0125. If all had been lost, the recovery would have been limited to that sum. Under the rule which is being applied in this case, if the weight of the coal which was lost had amounted to 55,000 pounds, plaintiff would be entitled to recover the sum of $266.75, on account of such loss,—an amount substantially greater than he could have recovered if the entire carload had been lost; and in addition thereto he would have on hand that part of the coal which was not lost, amounting to 33,700 pounds. Can this be a correct application of a correct rule?

9. Again, if we assume that the carload of coal in question had been purchased by a wholesale dealer, where does the rule contended for by plaintiff lead us? Confessedly, such wholesaler purchased the entire lot for the purpose of selling again at wholesale. Confessedly, the coal and each ton thereof, in the car would have been worth $5.75. It would sell for that and no more. That is the price which the wholesaler would ask for it and which he would expect to obtain for it, and the price which afterward he would realize therefor, when a sale should be made. The 5,500 pounds of coal is missing. If it had been in the car it would have been worth the same amount per ton as the other coal there, and would have sold for the same price. Under such circumstances is it possible that the wholesaler would have a right arbitrarily to say to the carrier: "I want that coal. It is worth only $5.75 per ton to me. I do not need the coal itself for any purpose. If I receive $5.75 in money for each ton thereof, I would be as well off as if I had the coal; but I want the coal and you must pay me $9.70 per ton for it, because that is the amount I must pay in the local market for other coal to replace that which has been lost." Or might the wholesale dealer in such case go a great deal further, as the plaintiff does in the case at bar, and say: "You have lost my 5,500 pounds of coal. I do not want it, or need it. I am not going to try to replace it. If I had it here in the car it would be worth only $5.75 per ton. That is my proximate loss. I could not sell it there for more than that amount. I am selling the remainder of the carload at that price. My only loss measured in money is the loss of the value of that coal in the car. But I demand that you pay me for the missing coal the price which I would have to pay for it at retail, if I desired or was obliged to replace it. That is $9.70 per ton." If

such a claim should be allowed, the wholesaler would be making money fast on lost coal. He would always wish for generous losses on all shipments to him. Admitting that the coal was worth only $5.75 per ton in the car and that if the missing coal had been there, he would have sold it at that price, he is nevertheless demanding $9.70 per ton therefor. It would seem quite improbable that the wholesale dealer would be allowed to successfully make such a claim. Quite clearly he would have to be content with $5.75 per ton. The coal of a retailer in a car, however, is worth no more than the same coal would be worth if owned by a wholesale dealer, and in case of the non-delivery of any part thereof, the loss would be precisely the same. There cannot be one measure of damages for the one dealer and another measure for the other.

Again, in testing the general accuracy of the decision here, the following considerations are not without some bearing: The carload of coal as delivered, with the missing coal out, was worth $239.20. If the carload had been intact, it would have been worth $255.0125. If instead of any coal having been lost, the carload of coal had been damaged so that when delivered it was worth only $239.20, then under all the authorities, the amount of recovery would be the difference between the value as actually delivered, and its value as it should have been if delivery had been as agreed. *United S. S. Co.* v. *Haskins*, 181 Fed. 962, 965, *Magdeberg, etc.* v. *Paulson*, 29 Fed. 530, 532-3. Such difference and the amount of such recovery would be $15.8125. But here, where the real loss is confessedly the same, we allow a recovery of $26.675. Or, stated otherwise, if two cars had been shipped, one to each of two separate dealers at the same destination, and if the coal in one car had been damaged in transit, so that on delivery, the carload was worth only $239.20, where it should have been worth $255.0125, and if from the other car certain coal had been lost in transit, so that such carload when delivered was worth also $239.20, when it should have been worth $255.0125, we should be allowing a recovery of $15.8125 in one case, and of $26.675 in the other.

10. From the foregoing it is reasonably clear that there is much confusion in the cases, and in the statement of the rules, and in their application to situations which are widely different. It is apparent that distinctions

which go well nigh to the root of the matter are sometimes overlooked. These distinctions seem to be vaguely in mind in some instances, where right conclusions are reached, without stating correctly the underlying reasons therefor. We speak of pleading special damages, and of values at the time and place of delivery, and of retail prices, and of profits, and of the right to go into the market and buy, and of the risk, cost and service in connection with retail operations, and of the price at which the commodity in question will sell in the local market. These matters are discussed indiscriminately in all kinds of cases where commodities have been lost in transit.

A distinction between the rule applicable to the loss of a separate article and that applicable to the loss of a larger quantity of merchandise, and especially when the latter is held for resale, is suggested in the quotation from Sutherland on Damages, *supra*. There is grave doubt whether there is any satisfactory reason, operating uniformly and in all cases, which will support such distinction. Whether the commodity lost was large in quantity, or was a single article; whether the consignee intended to effect a sale at wholesale, or at retail, or intended not to sell at all; whether the commodity was new or secondhand, are all questions of a strictly subordinate character. The one question which is the same in all cases where general damages only are involved, is the value of the lost commodity as that value would have been at the time and place of delivery under the conditions there contemplated, if delivery had been made as agreed. The apparent difficulty with different cases, and in the application of the rules thereto, is often in the evidence necessary and in the application thereof. It often occurs that the value of a large quantity of any commodity is not the same as the retail price at which such commodity is being sold in the local market. It is not always so easy to prove the value of a single article at a given point without inquiring into the prices there prevailing at retail; but if the value of a separate article at a given point is shown to be different from the retail price of such article in the local market, such article then takes the same course as the commodity in large quantity and is dealt with the same; and it should be clearly understood that the only legitimate purpose of consulting local retail prices in any such case is for the light, if any, direct or indirect, which a knowledge of such prices may

shed upon the ultimate questions of value above referred to. It is a course of procedure, not at all controlling, but advisory, which is employed in determining that value. No recognition is involved of any arbitrary right on the part of the claimant in such cases to go into the local retail market under any and all circumstances, and there make an actual purchase.

11. If the foregoing observations be deemed mainly or largely incorrect, or inconclusive, they will be disregarded. If, in the main, they shall be found to be correct, it may perhaps be considered, with reference to the first two classes hereinbefore referred to, in the first of which falls the case at bar, that the rules applicable thereto should be as next hereinafter set forth, with such variations therein as may seem proper.

a. In the usual or ordinary case involving general damages only, where the commodities have been lost in transit and where the loss thereby sustained is such only as follows naturally or in the usual course from such loss:

Under such circumstances the single question is the amount of proximate loss which has been sustained, and this in turn means what would the lost commodity have been worth in money at the precise time and place and under the conditions of the contemplated delivery, if delivery had been made as agreed.

If, by admission, or otherwise, on all the evidence, it is established that at such time and place the true value of the lost commodity was other than and different from the price at which such commodity was being bought and sold at retail in the local market, then such established value will be the measure of recovery; and the retail price will not prevail as a measure of recovery merely because that is the amount for which the plaintiff might have been able to sell the missing commodity at retail, or because, if he wished to replace the same, he would have been obliged to pay such retail price for the commodity with which to make such replacement.

If on the other hand, in such a case, either from absence or insufficiency of evidence, it is not satisfactorily established that the true value of the missing commodity, at the time and place of delivery, would have been an amount other than and different from the retail price thereof in the local market, then evidence of such retail price may be of greater weight and importance; and

where it is sufficiently persuasive of the true value, it may be accepted as indicating the proper measure of recovery. It is the value on the spot as that value would have been if the commodity had been delivered as agreed, with which we are concerned. That measures the proximate loss sustained by the consignee. It may, in certain cases, be the same as the retail price.

b. In the unusual case involving special damages, where the commodities have been lost in transit, and where by reason of special circumstances, the consignee has been under some reasonable compulsion to go into the local market and supply himself with the commodities which have been lost:

In cases under this head the consignee must pay the going price. If the goods which were lost consisted of carload lots, he then pays the price at which such quantities may be obtained. If the amount which he must have is obtainable at retail only, he must pay the retail price. Under such circumstances he must pay a certain amount to cover the cost of selling goods at retail and he must pay the retailer's profit, in justice to the carrier he should purchase at the lowest price at which the commodity is reasonably available. There is no question about the rule under such conditions. If the consignee pleads and proves the special circumstances, and that he was under reasonable compulsion to go into the local market and purchase either at wholesale or retail, and that such consequences were in the contemplation of the carrier and himself when the shipment was made he may recover the amount which he was compelled to pay.

There are other cases involving the loss of commodities in transit which fall outside any of the foregoing classes. Such cases are comparatively few in number and usually are of minor importance, although this may be otherwise. There is the case of the loss of goods purchased for a seasonal market, by a retailer, under circumstances such that they cannot be replaced in time to meet the trade. Examples of this are certain classes of women's wear which are sold at a particular time of the year, and toys purchased for the Christmas trade. In such cases the merchant loses the season's sale of such goods and the profits which would have accrued thereon. Under such circumstances the questions of what the goods could be bought for at destination, or what they would have been worth on the spot where they should

have been delivered, are not important. The only questions are what they would have sold for at retail, and what the net profits would have been thereon. In such special cases the merchant is usually allowed such net profits on the anticipated sales. That would be his actual loss.

Again, there is the loss of machinery, or parts thereof necessary in carrying on industrial or mechanical operations, where the effect of such loss is to suspend such operations and causes inconvenience and loss. If such consequences were in contemplation of the parties, a recovery may be had on account thereof.

There are also cases, where a single article of value is lost in transit, or where partially used household goods, or wearing apparel, or mechanical equipment are lost, and where there is no standard of value applicable thereto, except the current prices at retail. In such cases those prices are sometimes allowed to control as being the best evidence obtainable, or they are used as a standard from which deductions may be made. Such cases, however, often fall within the class where the consignee is under the reasonable compulsion of going into the market and replacing the lost commodity by purchase at retail. The real reason for allowing a recovery on the basis of the retail price, therefore, is sometimes not clear.

These latter classes are all special in their nature and special rules for estimating the amount of the damages are applied.

12. Aside from the few citations hereinbefore made, the authorities generally applicable in this case are referred to in the two aforementioned opinions therein. There is no difference of opinion between the parties as to the rule for determining the amount of plaintiff's damage,—the value at the time and place delivery should have been made. The sole dispute arises over our resort to retail prices in determining that value when the value already has been agreed on before and without such reference.

Various cases are cited where, in a general way, and for one reason or another, the courts say that in the particular case there in hand, the plaintiff should recover such amount as would enable him to enter the local market and replace that which had been lost. Generally there is no quarrel with such cases. More common still is the general statement that plaintiff is entitled to re-

cover the value or market value of the commodity lost at the place of destination.

13. At the time this case was first decided the one case, which, arguendo, most strongly and directly supported plaintiff's claims was *Heidritter Lbr. Co.* v. *Central R. Co.* (N. J.) 122 Atl. 691, 692. Since then, to the same effect, has been decided the case of *Leominster Fuel Co.* v. *New York, N. H. & H. H. R. Co.* (Mass.) 154 N. E. 831. The latter case rests on the authority of the Heidritter case, and the decision by the Court of Appeals in the case at bar. In both the Heidritter case and the Leominster case, the most distinguishing and controlling feature of the case at bar was entirely absent. Reference is now made to the value, established by agreement of the parties, which the coal in question would have had in car at destination if delivery had been made as agreed. This feature was not sufficiently stressed by this court in its earlier opinion.

In the Heidritter case it was said that "the real question at issue is whether the plaintiff was entitled to recover the retail value at destination, rather than the wholesale value at the point at shipment." p. 691. In the Leominster case the alternative allowed by the evidence was the cost of the coal at the mine, plus freight, which defendant claimed was the true basis of recovery, and the retail price of such coal at the yards of dealers, or such price delivered in plaintiff's yard. Plaintiff claimed a recovery on the latter basis and such claim was allowed. In both cases it was held, in effect, that the plaintiff should recover on the theory that he had a right to go into the local market and replace the lost commodity by purchase at retail, which theory, for the reasons hereinbefore set forth should not be conceded. It will be observed that each of these two cases are within a much narrower compass than the case at bar.

We are dealing here with a commodity which has two well recognized values or prices in the same market: One is the value or price at wholesale, when we are dealing with lots of 60,000 pounds or over; the other the value at the end and of after a considerable amount of service and expense and risk, which we call the value or price at retail. The loss here is part of a wholesale shipment. Shall we apply the retail price in determining the loss or damage sustained? It is believed that aside from the decisions by the Court of Appeals, the two cases cited

are the authorities which tend most directly to support plaintiff's views. Aside from the Heidritter case, the authorities cited in the decision of the Court of Appeals in support thereof, in the main, are content with announcing the general rule. The Yazoo case therein cited will be later referred to. The case of *Cutting et al.* v. *Grand Trunk Ry. Co.*, 13 Allen, 381, also cited, was a case of replevin for a quantity of flour which the defendant had refused to deliver until certain charges thereon claimed by defendant should be paid. The court states the rule for the measure of damages in case such as this, pp. 384, 385, and in connection with the discussion as to the measure of damages where there has been a delay in the delivery of goods, and a fall in the market value meantime, makes the statement quoted in the decision of the Court of Appeals herein. That excerpt and the decision throughout rests on the general statement of the value, or the market value of the goods at destination. The discussion goes no further. Profits are disallowed, p. 386, and at p. 387, it is said: "Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods." The general effect of this would be to hold plaintiff here to the value in the car. We, however, are asked to go much further than the allowance of profits. We are asked to allow and pay plaintiff for expenditures which he does not make, and for services which he does not render, and for risks which he does not take.

14. In opposition to the claims of plaintiff are a considerable number of cases which decline to adopt the retail market value as the measure of damages in cases such as this. They do not all employ the same reasoning, nor reach precisely the same results, but are all agreed in rejecting the retail price standard.

Brown Coal Co. v. *Illinois Central R. Co.* 196 Iowa, 562, is a carefully considered case. If the foregoing views are correct, the court there should have allowed a recovery based on the value of the coal in the car at destination. There is some ground for urging, however, that there is no clear evidence of such value.

Yazoo & M. V. R. Co. v. *Delta Grocery & Cotton Co.* (Miss.) 98 So. 777, was an action to recover the value of certain flour lost or damaged in transit. It is there stated that "the exact point in controversy is whether the appellee, a wholesale grocer, is entitled to recover

* * * the invoice or cost price, plus freight," of the damaged flour, "or the resale value, (that is the price at which the flour could have been sold, or as we will say, the reasonable cash market value) at the point of destination." p. 777. * * * "The damaged flour cost plaintiff $10.44 per barrel delivered at Clarksdale. Plaintiff recovered $11.30 per barrel for the damaged flour, which represents what plaintiff could have sold the flour for, or its reasonable wholesale cash market value at the point of destination." This wholesale cash market value is what defendant contends for here as the proper measure of recovery.

H. T. Cottam & Co. Inc. v. *Illinois Central R. Co.*, 3 La. Court of Appeal Reports, 240, was decided in October, 1925. The case was presented in such a way that contemplated profits occupied an important place in the case. These were disallowed and plaintiff held to the original cost of the merchandise, plus freight.

In *Central of Georgia R. Co.* v. *American Coal Co.* 28 Ga. App. 95, certain coal was lost in transit from a carload shipment. Plaintiff was limited in its recovery to the wholesale price at point of destination.

For further cases which decline to adopt the local retail price as the measure of damages in such cases, see the following authorities:

Chicago, R. I. & P. R. Co. v. *Broe,* 16 Okla. 25.

Texas & Pac. R. Co. v. *Payne,* 15 Tex. Civ. App. 58.

State v. *Smith,* 31 Mo. 566.

Cincinnati N. O. & T. P. R. Co. v. *Hansford,* 125 Ky. 37. In this case the evidence showed that the lost goods cost $317 and that if they had been received and sold at retail, a profit of $105.66 would have been realized thereon. There was no evidence as to what their value would have been at destination, or that it would have been more than the cost price. On that ground, as stated in the opinion, a recovery was limited to $317 and the prices at retail were disregarded.

Quanah A. & P. Co. v. *Novit* (Tex. Civ. App.) 199 S. W. 496.

15. For the reasons stated near the beginning of this opinion judgment will be entered allowing plaintiff a recovery at the rate of $9.70 per ton for the coal which was lost.

Dated September 23, 1927.

WM. A. CANT,
U. S. District Judge.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1928.

NO. 75

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

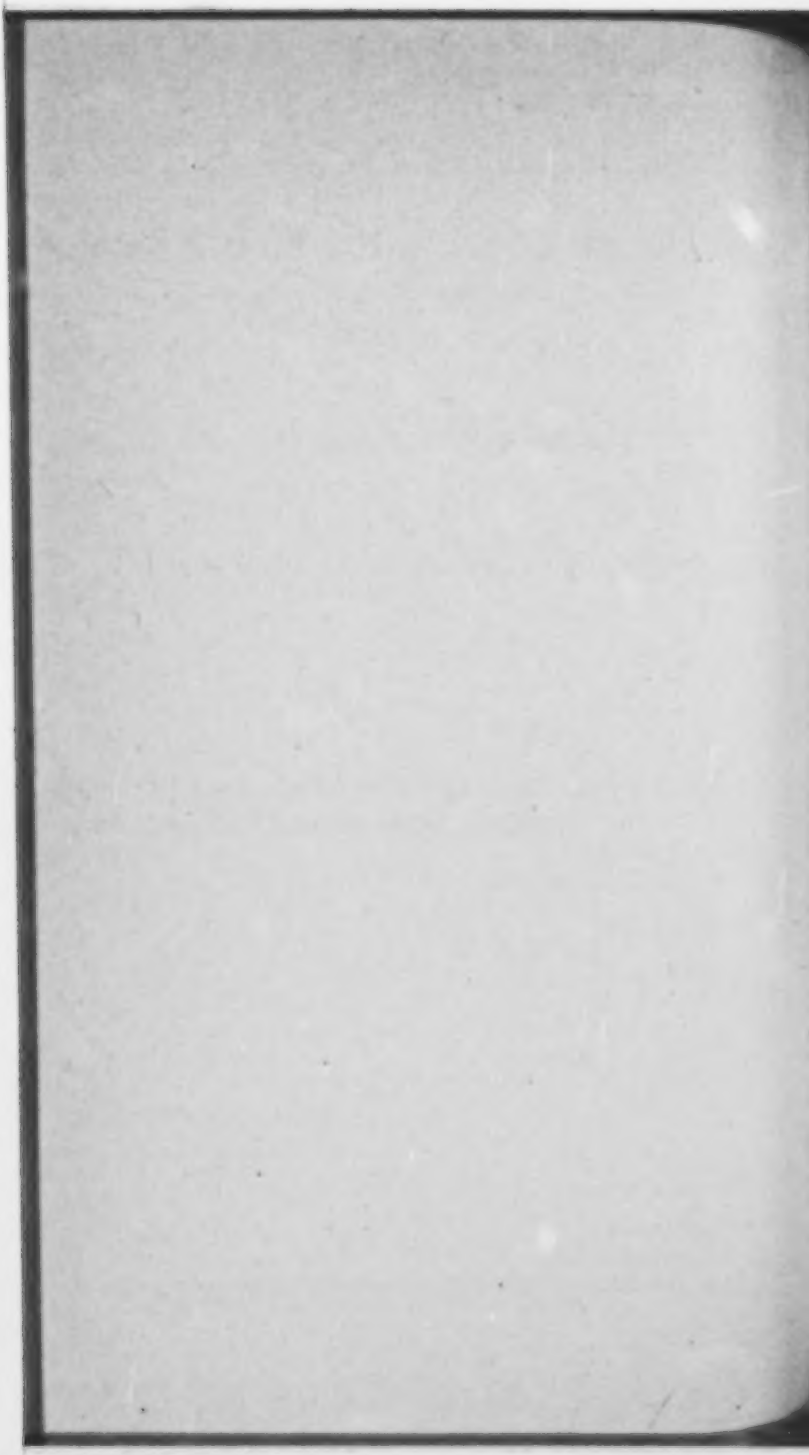
G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STANLEY B. HOUCK,
Attorney for Respondent.

W. YALE SMILEY,
Of Counsel.

Hayward Brief Co., 601-5 Fourth Ave. So., Minneapolis



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Supreme Court of the United States

OCTOBER TERM, 1928.

No.....

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

Respondent respectfully states and represents in opposition to the petition for writ of certiorari of the above named petitioner that:

(1) Respondent acquiesces in the correctness of petitioner's statement of the importance of the case (Petition, pp. 3, 4).

(2) Respondent, also, acquiesces in the correctness of the statements of petitioner relative to conflict of decisions (Petition, p. 5).

(3) Respondent, however, respectfully urges and represents to this Honorable Court that the judgment and decision of the Circuit Court of Appeals for the Eighth Cir-

cuit rendered on the 20th day of February, A. D. 1929, is right and correct; and that there is no error therein which requires or warrants review by this Honorable Court.

STATEMENT OF CASE.

Respondent acquiesces in the correctness of petitioner's statement of the case (Petition, pp. 6-9).

CONTENTION OF RESPONDENT.

It is respondent's position and contention in opposition, and in answer, to the petition that the true measure of damages for the breach of a contract to transport and deliver coal or other like personal property at a certain place and time is the fair, average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed. It is the amount it would have been necessary for the shipper and owner to pay in the open market at the time and place of delivery for such a quantity and kind of coal or other property as the carrier failed to deliver as it agreed.

Crail vs. Illinois Central Railroad Company, 13 Fed. (2nd) 459.

Respondent has at no time sought the recovery of retail price. Respondent has at all times sought to recover the value in the market at destination at the time the shipment arrived there, of the 5,500 pounds of coal lost from the car. Respondent has, also, insisted that the value of the lost 5,500 pounds of coal must be determined in the destination market in reference to quantities of 5,500 pounds; that that value can not be determined by reference to any other quantity.

PRAYER.

Respondent respectfully prays and urges that a writ of certiorari be denied to the petitioner and that this cause be not reviewed and determined by this court.

STANLEY B. HOUCK,
Attorney for Respondent.

W. Y. SMILEY,
Of Counsel.

State of Minnesota,
ss.
County of Hennepin.

Stanley B. Houck, being duly sworn, makes oath that he is the counsel for respondent in the above cause and that he prepared the foregoing brief for respondent in opposition to the petition for writ of certiorari, and that the allegations therein contained are true as he verily believes.

STANLEY B. HOUCK.

Subscribed and sworn to before me this 15th day of May, A. D. 1929.

C. A. BRUCE,
Notary Public,
Hennepin County, Minnesota.

My commission expires January 8, 1930.

Supreme Court of the United States

OCTOBER TERM, 1928.

No.....

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

May it please the court:

As petitioner states in its petition (Petition, p. 2), both parties agree that the market value at destination is the measure of the damages. The real difference and issue between the parties therefore must be solely and only what the market value of the 5,500 pounds of coal lost from the shipment in question was at destination. The question presented is merely one of determination of the value of the 5,500 pounds of coal lost from the shipment. Respondent contends that that value must be determined in exactly the same way that value must be determined in any other case—that this case is no different from and involves nothing more than any other case requiring a determination of value.

Respondent respectfully urges that the contention and po-

sition of petitioner involves a contradiction. After asserting that both parties agree that the market value at destination is the measure of the damages, petitioner demands that value at destination be found to be a figure at which the stipulation of facts (Rec., 8, 9) conclusively shows the lost 5,500 pounds of coal could *not* have been obtained in the market at destination when the remainder of the shipment arrived there.

Respondent respectfully presents the following analysis and statement of its position and contention:

I.

The measure of damages is the value of the commodity which has been lost at the time and place at which it should have been delivered, with interest, less the transportation charges, if they have not been paid.

This is the common law rule stating the measure of damages for loss in transit by a common carrier. The rule has not been changed or affected, so far as this case is concerned, by the so-called Cummin's Amendment to the Interstate Commerce Act (Act. Cong. Aug. 9, 1916; U. S. Comp. St., Sec. 8604a).

Chicago, M. & St. P. Ry. Co. vs. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504, 64 L. Ed. 801.

Leominster Fuel Co. vs. New York, N. H. & H. R. Co., 258 Mass. 149, 154 N. E. 831.

Crutchfield & Woolfolk vs. Hines, 239 Mass. 84, 131 N. E. 340.

Woonsocket M. & P. Co. vs. New York, N. H. & H. R. Co., 239 Mass. 211, 131 N. E. 461.

Hoover & Co. vs. Denver & R. G. W. R. Co., 17 Fed. (2nd) 881, 886.

Allen vs. Adams Express Co., 77 Pa. Super. 174.
Atlantic Coast Line Ry. Co. vs. Roe, Fla., 118 So. 155, 156.

Petitioner states (Petition, p. 2):

"Both parties agree that the market value at destination is the measure of the damages."

The United States District Court in both of its decisions adopted this rule as that applicable to the case.

Crail vs. Illinois Cent. R. Co. (D. C. Minn.), 2 Fed. (2nd) 287; 21 Fed. (2nd) 836.

II.

If the commodity be a staple which, like coal, is produced for sale and consumption, not for retention and long use, the only inquiry to be made in reckoning its value is its worth as an article of sale. If it be shown that at the destination, at the time the remainder of the shipment arrived there, there was a market in which like coal in volume was openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its loss.

The foregoing statement is taken almost verbatim from an opinion of the U. S. Circuit Court of Appeals for the Third Circuit.

U. S. vs. New River Collieries Co., 276 Fed. 690.

The decision of the Circuit Court of Appeals was later affirmed by the U. S. Supreme Court, which quoted and specifically affirmed the foregoing principle.

U. S. vs. New River Collieries Co., 262 U. S. 341, 43 Sup. Ct. 565, 67 L. Ed. 1014.

Section V, paragraph (a), of the stipulation of facts (Rec., p. 4), states facts which brings this case within the foregoing rule, and establishes the existence of a market at destination:

> "At the destination of said shipment on October 17, 1922, for a long time prior thereto, and ever since, coal of the kind, size and grade contained in said shipment and coal of many other kinds, sizes and grades, had a free and ready market in any quantity, whether less or more than one ton, or by the carload or by a number of carloads. The sales and purchases in said market from day to day were substantial in number and volumes."

III.

If the quantity of the coal bought and sold affects the prices current in the market, fair market value must be determined by ascertaining the prices current in the market for the purchase or sale of the quantity the value of which is to be determined.

Section V, paragraph (d), of the stipulation of facts (Rec., p. 9), fully establishes the destination market value of coal in the amount lost from the shipment:

> "(d) On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser in lots of 5,500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less. At and prior to the time of delivery of said shipment less than carload lots

of coal had not been sold in said market and delivered to or into any car on track as aforesaid."

The United States Supreme Court has given us a complete definition of market value:

"In the matter of Cliquot's Champagne, Judge Hoffman defined the market value of goods to be 'the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade'; and the definition was approved by this court. *Cliquot's Champagne,* 3 Wall. 114, 125, 142."

Muser vs. Magone, 155 U. S. 240, 249.

"The expressions actual value, market value, or market price, when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales public or private in the way of ordinary business. *Century Dictionary; Anderson's Law Dictionary; Murray vs. Stanton,* 99 Mass. 348; *Cliquot's Champagne,* 3 Wallace 114."

Sanford vs. Peck, 63 Conn. 486, 493.

The above quoted paragraph of the stipulation of facts specifically states that "said coal in said quantity * * * could not at said time have been purchased in said market for less." Paragraph (c) of Section V of the stipulation of facts (Rec., p. 9), states with reference to carload values at point of shipment that "quantities of less than carload lots were not obtainable in said market at said time and place at said price," $5.50 per ton. Paragraph (b) contains the

same statement with reference to the carload price at destination, $5.75 per ton.

There can scarcely be any serious contention that the market value of 5,500 pounds of coal is any less price per ton than the only price at which it can be freely and readily secured in the market. The only market value for 5,500 pounds of coal which the evidence in this case discloses is $13.00 per ton.

IV.

In determining the value of the commodity which has been lost, the inquiry is limited to the time when the shipment from which the loss occurred was delivered at destination. It is improper to inquire into later events such as whether plaintiff in error was under any necessity of making replacement, or did in fact replace, or that he was a coal dealer, making purchases in carload lots from time to time as his necessity required, which purchases included coal of the kind and quality here in question, of which on the arrival of the carload from which the loss occurred, he had sufficient for his needs until the arrival of the next carload of the same kind which should be purchased.

The foregoing principle has been specifically decided by the Supreme Court of Massachusetts, which used the following language:

> "The property is to be estimated in the same manner as it would be, if a jury could have been called on the spot, at the moment the damage was discovered, to estimate it. They would consider the market value of the day. * * * The drawback afterwards allowed by the Government * * * was a casual and accidental advantage, accruing afterwards, and originating in a meas-

ure which took place after the facts fixing the plaintiff's claim to damages had all occurred."

Stone vs. Codman, 15 Pickering (Mass.) 297, 300.

The Supreme Court of the United States has considered the same subject and stated its opinion thereon as follows:

"The general tendency of the law, in regard to damages, at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds vs. Mapes-Reeve Construction Co.,* 177 Massachusetts 41, 44."

Southern Pac. Co. vs. Darnell-Taenzer Co., 245 U. S. 531, 534.

V.

The true measure of damages for the breach of a contract to transport and deliver coal or other like personal property at a certain place and time is the fair average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed. It is the amount it would have been necessary for the shipper or owner to pay in the open market at the time and place of delivery for such a quantity and kind of coal or other property as the carrier failed to deliver as it agreed.

The simple market value, not its component parts nor the sources from which it is derived nor its other concomitants, shall measure such damages.

Crail vs. Illinois Central Railroad Co., 13 Fed. (2nd) 459.

Atlantic Coast Line Ry. Co. vs. Roe, Fla., 118 So. 155.

Heidritter Lbr. Co. vs. Central R. Co., 122 Atl. 691, 125 Atl. 926.

Leominster Fuel Co. vs. New York, N. H. & H. R. Co. (Mass.), 154 N. E. 831.

Gulf, C. & S. F. Ry. Co. vs. Cleburne I. & F. Co., 37 Tex. Civ. App. 334, 79 S. W. 836.

Quanah A. & P. Ry. Co. vs. Campbell (Tex. Civ. App.), 170 S. W. 859.

St. L. & S. F. Ry. Co. vs. Watkins, 45 Tex. Civ. App. 321.

VI.

Conclusion.

It is respectfully contended and urged by respondent that the petition should be denied and a review of the judgment and decision of the Circuit Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

STANLEY B. HOUCK,
Attorney for Respondent.

W. YALE SMILEY,
Of Counsel.

FILE COPY

DEC 2
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 75.

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR RESPONDENT.

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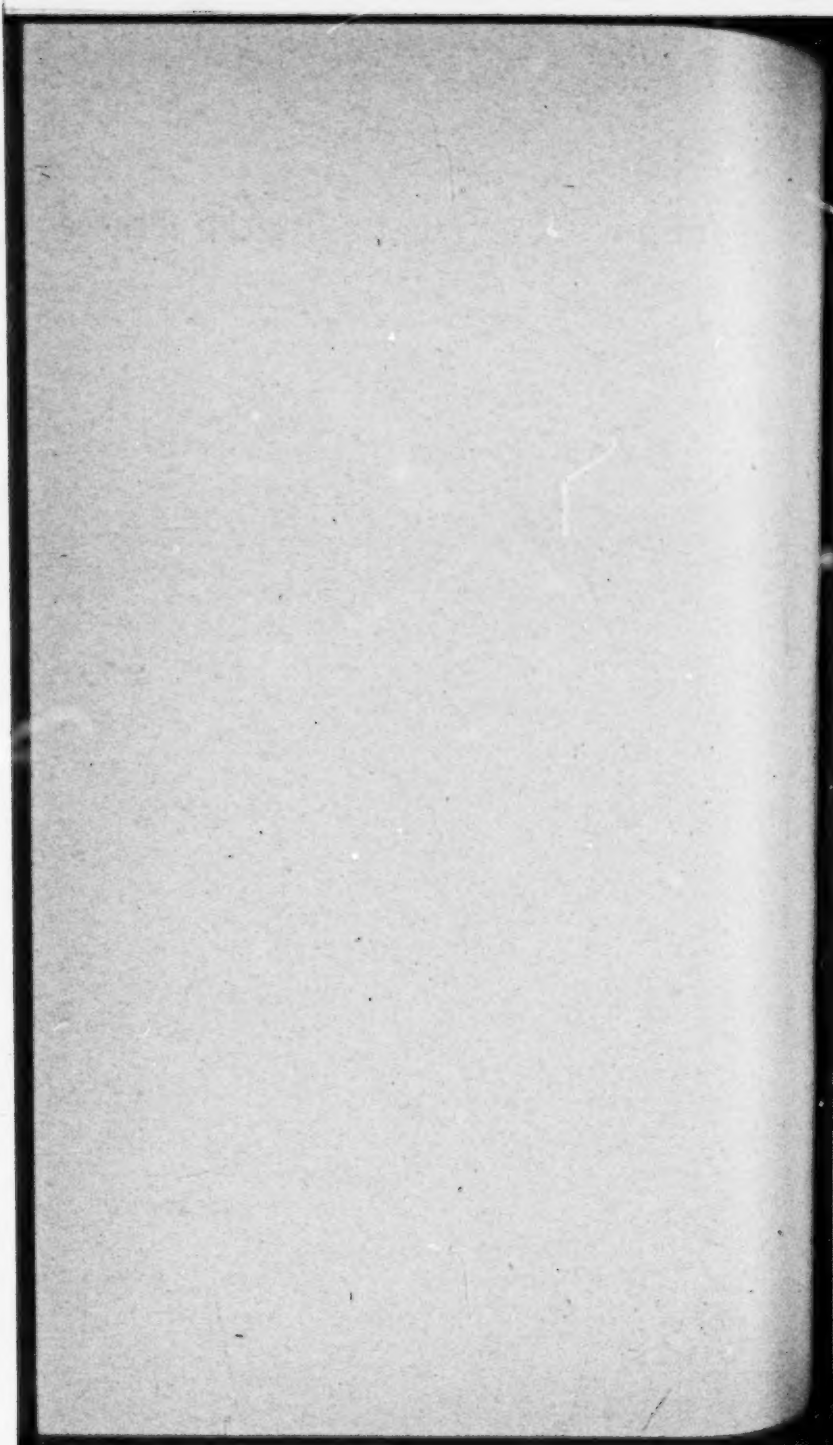
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Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 75.

ILLINOIS CENTRAL RAILROAD COMPANY,

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vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,

Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT OF THE CASE.

Petitioner's statements on pages 5, 6 and 7 of its brief, under the above title are substantially correct. But a large portion of the statement is a summary of section VIII of the stipulation of facts (R. 9, 10), to the materiality and relevancy of which respondent duly objected at the trial (R. 11).

It is respondent's view that the only material and relevant facts are the following:

Petitioner, admits, on page 6 of its brief, that it is liable to respondent for the full actual loss, damage or injury occa-

sioned by loss in transit of 5,500 pounds of coal from an interstate shipment (R. 7, 8).

When the shipment from which the loss occurred arrived at destination, there was at destination a free and ready market, in any quantity, for coal of the kind, size and grade lost (R. 8).

At the time, the fair, reasonable, average market value and price of coal of the kind, size and grade lost in transit from the shipment, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5,500 pounds was $13.00 per ton, including freight; and such coal in such quantity to be delivered to the purchaser, for consumption or any other use could not at that time have been purchased in that market for less (R. 9).

ULTIMATE QUESTION.

Petitioner, on page 6 of its brief, admits liability to respondent in some amount.

Petitioner correctly states, on page 12 of its brief, that "both parties agree that the market value at destination is the measure of damages."

The sole question, then, is what is the market value at destination of the 5,500 pounds of coal for the loss of which in transit petitioner is liable to respondent?

BRIEF OF ARGUMENT.

May It Please The Court:

SUMMARY OF RESPONDENT'S ARGUMENT.

The true measure of damages for the breach of a contract to transport and deliver coal or other like personal property

at a certain place or time is the fair average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed. It is the amount it would have been necessary for the shipper or owner to pay in the open market at the time and place of delivery for such a quantity and kind of coal or other property as the carrier failed to deliver as it agreed.

If the commodity lost be a staple which, like coal, is produced for sale and consumption, not for retention and long use, the only inquiry to be made in reckoning its value is its worth as an article of sale. If it be shown that at the destination, at the time the remainder of the shipment arrived there, there was a market in which like coal in volume was openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its loss.

The simple market value, not its component parts nor the sources from which it is derived nor its other concomitants, shall measure such damages.

I.

THE MEASURE OF DAMAGES FOR THE LOSS IN TRANSIT OF A PART OF A SHIPMENT IS THE VALUE OF WHAT HAS BEEN LOST AT THE TIME AND PLACE AT WHICH IT SHOULD HAVE BEEN DELIVERED, WITH INTEREST, LESS THE TRANSPORTATION CHARGES, IF THEY HAVE NOT BEEN PAID.

The foregoing states the common law rule for measuring damages for loss in transit by a common carrier.

The so-called Cummin's Amendment to the Interstate Commerce Act (Act. Cong. March 4, 1915, 38 Stat. L. 1196, as amended by Act. Cong. Aug. 9, 1916, 39 Stat. L. 441 and

Act. Cong. Feb. 28, 1920, 41 Stat. L. 494), has not changed this rule.

Chicago, M. & St. P. Ry. Co. vs. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504, 64 L. Ed. 801.

Leominster Fuel Co. vs. New York, N. H. & H. R. Co., 258 Mass. 149, 154 N. E. 831.

Crutchfield & Woolfolk vs. Hines, 239 Mass. 84, 131 N. E. 340.

Woonsocket M. & P. Co. vs. New York, N. H. & H. R. Co., 239 Mass. 211, 131 N. E. 461.

Hoover & Co. vs. Denver & R. G. W. R. Co., 17 Fed. (2nd) 881, 886.

Allen vs. Adams Express Co., 77 Pa. Super. Ct. 174.

Atlantic Coast Line Ry. Co. vs. Roe (Fla.), 118 So. 155, 156.

Both the District Court and the Circuit Court of Appeals in this case have held that this rule is applicable to this case.

Crail vs. Ill. Cent. R. Co., 2 Fed. (2nd) 287; 13 Fed. (2nd) 459; 21 Fed. (2nd) 836; 31 Fed. (2nd) 111.

Petitioner states, on page 12 of its brief, that "both parties agree that the market value at destination is the measure of damages."

The Circuit Court of Appeals for the Eighth Circuit, to which the writ of certiorari in this case is directed, found that "the true measure of damages for the breach of a contract to transport and deliver coal or other like personal property at a certain place or time is the fair average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed."

Ill. Cent. R. Co. vs. Crail, 13 Fed. (2nd) 459.

II.

IF THE COMMODITY LOST IN TRANSIT BE A STAPLE WHICH, LIKE COAL, IS PRODUCED FOR SALE AND CONSUMPTION, NOT FOR RETENTION AND LONG USE, THE ONLY INQUIRY TO BE MADE IN RECKONING ITS VALUE IS ITS WORTH AS AN ARTICLE OF SALE. IF IT BE SHOWN THAT AT THE DESTINATION, AT THE TIME THE REMAINDER OF THE SHIPMENT ARRIVED THERE, THERE WAS A MARKET IN WHICH LIKE COAL IN VOLUME WAS OPENLY BOUGHT AND SOLD, THE PRICES CURRENT IN SUCH MARKET WILL BE REGARDED AS ITS FAIR MARKET VALUE AND LIKEWISE THE MEASURE OF JUST COMPENSATION FOR ITS LOSS.

Market value has been defined as follows:

"In the matter of Cliquot's Champagne, Judge Hoffman defined the market value of goods to be 'the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade'; and the definition was approved by this court. *Cliquot's Champagne,* 3 Wall. 114, 125, 142."

Muser vs. Magone, 155 U. S. 240, 249.

"The expressions actual value, market value, or market price, when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales public or private in the way of ordinary business. *Century Dictionary; Anderson's Law dictionary; Murray vs. Stanton,* 99 Mass. 348; *Cliquot's Champagne,* 3 Wallace 114."

Stanford vs. Peck, 63 Conn. 486, 493.

More lately, this court said in *United States vs. New River Collieries Co.*, 262 U. S. 341; 43 Sup. Ct. 565, 67 L. Ed. 1014:

> "The facts bring this case within the rule stated by the Circuit Court of Appeals (276 Fed. 690, at p. 692):
>
> 'If it be an article commonly traded in on a market, and it is shown that, at the time and place it was taken, there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition.' The lower courts rightly held that market prices prevailing at the times and place of the taking constitute just compensation."

Section V, paragraph (a), of the stipulation of facts (R. 8) states facts which establish the existence of a market at destination within the meaning of the cases cited:

> "At the destination of said shipment, on October 17, 1922, and for some time prior and subsequent thereto, coal of the kind, size and grade contained in said shipment and coal of many other kinds, sizes and grades, had a free and ready market in any quantity, whether less or more than one ton, or by the carload or by a number of carloads. The sales and purchases in said market from day to day were substantial in number and volume."

Respondent does not understand that petitioner denies the existence of a fair market at destination when the remainder of the shipment arrived there.

III.

THE MARKET VALUE AT DESTINATION OF THE QUANTITY OF COAL LOST IN TRANSIT IS THE AMOUNT IT WOULD HAVE BEEN NECESSARY FOR THE SHIPPER OR OWNER TO PAY IN THE OPEN MARKET AT THE TIME AND PLACE OF DELIVERY FOR SUCH A QUANTITY AND KIND OF COAL OR OTHER PROPERTY AS THE CARRIER FAILED TO DELIVER AS IT AGREED.

The foregoing is quoted verbatim from the opinion of the Circuit Court of Appeals in *Ill. Cent. R. Co. vs. Crail,* 13 Fed. (2nd) 459.

Section V, paragraph (d), of the stipulation of facts (R. 9) states facts fully establishing the destination market value of the 5,500 pounds of coal lost in transit:

> "(d) On or about October 17, 1922, at Minneapolis, Minnesota, the fair reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser in lots of 5,500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to said purchaser, for consumption or any other use, could not at said time have been purchased in said market for less."

The above quoted paragraph specifically states that "said coal in said quantity * * * could not at said time have been purchased in said market for less." Paragraph (c) of section V of the stipulation of facts (R. 9) states, with reference to carload values at destination, that "quantities of less than carload lots were not obtainable in said market at said time and place at said price."

It would seem to be unnecessary to urge that if the quan-

tity of the coal, bought and sold affects the prices current in the market, fair market value must be determined by ascertaining the prices current in the market for the purchase or sale of the quantity the value of which is to be determined.

This is the holding of *Wendnagel vs. Houston,* 155 Ill. App. 664, and the quotation appearing therefrom on page 14 of petitioner's brief.

If—and it is specifically so stipulated—5,500 pounds of coal of the kind, size and grade lost from the shipment "could not have been purchased in said market for less than $13.00," it is scarcely open to controversy that the market value thereof is $13.00 per ton and not less.

Certainly if "quantities of less than carload lots were not obtainable in said market at said time and place" (R. 9) for $5.75 per ton, the value of 5,500 pounds of coal was not $5.75 per ton.

The further language of this court in *United States vs. New River Collieries Co., supra,* seems relevant:

> "Nor was it error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that, if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking.
>
> "The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions

were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. These facts indicate a free market. The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices."

It is clear, in this case, that respondent, had the 5,500 pounds of coal not been lost in transit, could have obtained $13.00 per ton for it in the destination market.

IV.

General Answer to Petitioner.

Petitioner's position seems to be a dual one; or, at least, in the alternative: *First,* it claims that the value of the 5,500 pounds of lost coal is to be determined by destination value but only *in the car,* and that, so determined a lot of 5,500 pounds has the same value per ton as a lot of a carload would have. *Second,* it asserts that the measure of damages is not the value of what is lost but the difference in value between the larger and smaller cars.

The same may be said of the opinion of the District Judge in *Crail vs. Ill. Cent. R. Co.*, 21 Fed. (2nd) 836.

Most liberally construed, petitioner's argument is in substance a request for a new rule to measure damage for loss in transit. While admitting in its brief that the rule is as heretofore stated in this brief—value at destination of what has been lost in transit (Petitioner's Brief, pp. 18, 21)—it nevertheless flatly contends for an entirely new measure of damages for losses in transit. That new rule is stated on page 18 of petitioner's brief. It is that the "measure of damages is difference between market value of coal delivered in

accordance with contract and market value of the car as it was in fact delivered."

In leading up to this new rule it refers to "value of the coal *in the car*"; to the fact that the "duty of petitioner terminated when it delivered the car of coal; to wholesale and retail prices; to the contemplation of the parties; to collateral matters affecting the conduct of respondent's business; and so forth."

Petitioner cites no case—and respondent is sure there is none— which recognizes its theory that *value in the car,* or the *termination of petitioner's duty with delivery* of the car, in anywise affects or changes liability. Neither claim presents anything new. Both situations have existed during the history of common carriage. None of petitioner's reasoning, based upon them, is convincing that a rule as ancient as common carriage itself has always been wrong and that wrong must now be righted. Neither does petitioner cite cases holding that the value of a small lot is to be determined by ascertaining the deference in value between two larger lots.

Petitioner seems to feel that some strength for its position lies in the application of the adjective *retail* to the $13.00 per ton price in this case. What is in fact a fair, average value or price in a proper market obviously remains so, by whatever adjective it may be described. See, *Wendnagel vs. Houston, supra,* and *Haskell vs. Hunter,* 23 Mich. 305, 309.

There can be no quibble about the statutory liability being for the full, actual, loss, damage or injury. Neither can there be any real doubt that where the property lost has a readily ascertainable market value at the proper time and place, that value is the measure of full, actual loss, dam-

age, or injury. Such is the holding of this court in *United States vs. New River Collieries Co., supra.* In that case also, this court answers petitioner's argument about the justness of a recovery at $13.00 per ton by holding that "the lower courts rightly held that market prices prevailing at the times and place of the taking constitute just compensation."

Moreover, respondent understands that where the law has established a rule for measuring damage for breach of contract, such as loss in transit by a carrier, the parties are conclusively presumed to contemplate a measurement of such a loss by that rule.

1 *Sedgwick on Damages* (9th Ed.), Sec. 40, p. 45.

1 *Sutherland on Damages* (4th Ed.), Sec. 105, p. 367.

Brown vs. Chi., M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41.

There seems to be an intimation near the top of page 15 of petitioner's brief that because the $13.00 market value or price includes delivery at the expense of the dealer that value is inapplicable as a measure of damages in this case. No elaboration of this intimation appears in the brief. It is common knowledge that articles like coal when delivered in small quantities, are delivered by the seller to the purchaser and require for such delivery special facilities such as only a dealer possesses. Read as a whole the paragraph of the stipulation of facts (R. 9) is extremely broad in its terms and covers all sales in quantities of 5,500 pounds in the destination market, both with and without refinements of the sort petitioner suggests. But—even on petitioner's theory—respondent is entitled to have the 5,500 pounds in the car, which requires its delivery there.

There is also an intimation that because no sale was ever made calling for delivery into a car at destination, the $13.00

price is not applicable. If there be merit to this contention, there is no value in the market for a sale to a new home or place of business located between two similar places where, under identically similar conditions, the $13.00 price measures market value.

V.

IN DETERMINING THE VALUE OF THE COMMODITY WHICH HAS BEEN LOST, THE INQUIRY IS LIMITED TO THE TIME WHEN THE SHIPMENT FROM WHICH THE LOSS OCCURRED WAS DELIVERED AT DESTINATION. IT IS IMPROPER TO INQUIRE INTO LATER EVENTS SUCH AS WHETHER PLAINTIFF IN ERROR WAS UNDER ANY NECESSITY OF MAKING REPLACEMENT, OR DID IN FACT REPLACE, OR THAT HE WAS A COAL DEALER, MAKING PURCHASES IN CARLOAD LOTS FROM TIME TO TIME AS HIS NECESSITY REQUIRED, WHICH PURCHASES INCLUDED COAL OF THE KIND AND QUALITY HERE IN QUESTION, OF WHICH ON THE ARRIVAL OF THE CARLOAD FROM WHICH THE LOSS OCCURRED, HE HAD SUFFICIENT FOR HIS NEEDS UNTIL THE ARRIVAL OF THE NEXT CARLOAD OF THE SAME KIND WHICH SHOULD BE PURCHASED, ETC. ETC.

The foregoing principle has been specifically decided by the Supreme Court of Massachusetts, which used the following language:

> "The property is to be estimated in the same manner as it would be, if a jury could have been called on the spot, at the moment the damage was discovered, to estimate it. They would consider the market value on the day. * * * The drawback afterwards allowed by the Government * * * was a casual and accidental advantage, accruing afterwards, and originating in a measure which took place after the facts fixing the plaintiff's

claim to damages had all occurred."

Stone vs. Codman, 15 Pickering (Mass.) 297, 300.

This court has considered the said subject and said:

"The general tendency of the law, in regard to damages, at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds vs. Mapes-Reeve Construction Co.*, 177 Massachusetts 41, 44."

Southern Pac. Co. vs. Darnell-Taenzer Co., 245 U. S. 531, 534.

Much of petitioner's argument is based upon portions of the stipulation of facts to the materiality and relevancy of which respondent duly objected at the trial (R. 11). This objection covered the following portions of the stipulation of facts:

"That portion of section V, subdivision (a) which reads: 'Purchases of carload lots, containing 60,000 pounds or more, in said market are termed wholesale purchases and purchases of less than carload lots are termed retail purchases' (R. 8).

That portion of section V, subdivision (d) which reads: 'At and prior to the time of delivery of said shipment less than carload lots of coal had not been sold in said market and delivered to or into any car on track as aforesaid' (R. 9).

All of section VIII of said stipulation; and each separate fact stated in said section VIII considered sepa-

rate and distinct from each other fact therein stated" (R. 9, 10).

Section VIII contains the following statements (R. 9, 10):

"The coal contained in said shipment had not been sold by plaintiff nor had its sale been contracted for prior to the arrival of said shipment, nor was it sold or contracted for sale on October 17, 1922, but the coal contained in said car, PMCK&Y No. 91352, was added to the general stock of coal of the plaintiff at Minneapolis, aforesaid, and had this 5,500 pounds of coal been contained in this car it would have been added to the general stock of coal of the plaintiff at Minneapolis, aforesaid. Plaintiff lost no sale of coal because the said car of coal contained only 83,200 pounds of coal. Plaintiff did not at any time purchase any coal for the purpose of replacing any coal lost from this shipment, except the purchase in carload lots to maintain his stock of said Southern Illinois No. 2 nut soft coal of that kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine in the regular and customary course of his business; and plaintiff and other fuel dealers at said time ordinarily purchased coal exclusively in carload lots f. o. b. mine. That had this car of coal when shipped from the mine contained only 83,200 pounds of coal, the plaintiff would have purchased it. That on and after said October 17, 1922, plaintiff had on hand coal of the kind, size and grade in question, in quantities sufficient to meet the demands of his business and the failure to receive the 5,500 pounds of coal aforesaid in no way interfered with the maintaining by the plaintiff of his ordinary and usual stock of coal, nor did he purchase any coal to take its place, except by the purchase of coal in carload lots

of $5.50 per ton f. o. b. mine in the regular and customary course of his business. Defendant's services in the transportation of the coal in this case ended in the delivery of the car containing the coal upon the said industry track. The unloading of the coal and the further handling of the same for sale or delivery in less than carload lots was at the expense of the plaintiff."

The only material and relevant inquiry in this case is the market value at destination, at the time the remainder of the shipment reached destination, of the 5,500 pounds of coal lost in transit from the shipment. The foregoing facts to which respondent objected are, upon the authority of the cases above cited, immaterial and irrelevant because neither any nor all of said facts tend to prove what was the value of the missing 5,500 pounds of coal.

Similarly, petitioners' argument based upon those facts, is without bearing upon that same issue—the value of the missing 5,500 pounds of coal.

VI.

True Measure of Damages.

Summarizing its argument, respondent urges that the Circuit Court of Appeals for the Eighth Circuit, to which the writ of certiorari in this case is directed, correctly held (13 Fed. (2nd) 459), that the true measure of damages for the breach of a contract to transport and deliver coal or other like personal property at a certain place and time is the fair average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed. It is the amount it would have been necessary for the shipper or owner to pay in the

open market at the time and place of delivery for such a quantity and kind of coal or other property as the carrier failed to deliver as it agreed.

Heidritter Lbr. Co. vs. Central R. Co., 122 Atl. 691, 125 Atl. 926.

Leominster Fuel Co. vs. New York, N. H. & H. R. Co. (Mass.), 154 N. E. 831.

Gulf, C. & S. F. Ry. Co. vs. Cleburne I. & F. Co., 37 Tex. Civ. App. 334, 79 S. W. 836.

Quanah A. & P. Ry. Co. vs. Campbell (Tex. Civ. App.), 170 S. W. 859.

St. L. & S. F. Ry. Co. vs. Watkins, 45 Tex. Civ. App. 321.

Atlantic Coast Line Ry. Co. vs. Roe (Fla.), 118 So. 155.

"At the destination the only market value of coal in the quantity lost by the carrier was that established by the retail trade. There was no wholesale market where the plaintiff could procure that quantity. The plaintiff was under no obligation to buy another carload of coal at the mine in order to reduce the damage. The plaintiff had not been deprived of a carload but of a much less quantity. The plaintiff could have sold the coal lost by the defendant at $14 per ton in the ordinary course of its retail trade, and coal of that quantity could have been procured delivered at its yard only by payment of that price. That is the amount which it would have been obliged to pay in the open market, at the time and place when the defendant ought to have delivered this coal, for such quantity and quality of coal as the defendant failed to deliver to the plaintiff according to its contract. It is a mere coincidence that this market value happens to involve some element of profit arising in retail business. Such element is recoverable as a separate damage.

Crutchfield & Woolfolk vs. Director General of Railroads, 239 Mass. 84, 89. But that does not prevent recovery by the plaintiff of the full actual damage sustained by it."

Leominster Fuel Co. vs. New York, N. H. & H. R. Co. (Mass.), 154 N. E. 831.

"The testimony as to market value of the goods was not restricted to their price at retail. The testimony showed that the stoves could not be had at Llano, that the only place where they could be gotten was in St. Louis, that the supply in Llano was not equal to the demand for such goods at the time, and that if such goods had not been damaged their actual market value at Llano at the time they were delivered would have been in the aggregate the sum of $438, and that at that time they could have been sold for that amount. Their market value in bulk, under the circumstances, might have been equal to the amount they would have brought at retail prices in the aggregate."

St. Louis & S. F. Co. v. Watkins, 45 Tex. Civ. App. 321.

The simple market value, not its component parts nor the sources from which it is derived nor its other concomitants, shall measure such damages.

The Rossend Castle, 30 Fed. 462.

The Erroe, 17 Blatchf. (C. C.) 16, Fed. Cas. 4522.

Moelring vs. Smith, 7 Ind. App. 451, 34 N. E. 675.

Waggoner Undertaking Co. vs. Jones (Mo.), 114 S. W. 1049.

VII.

CONCLUSION.

It is respectfully urged by respondent that the decision of the lower court was correct in every particular and should be affirmed.

Dated at Minneapolis, Minnesota, November 30, 1929.

Respectfully submitted,

G. I. CRAIL,

Doing Business as P. McCoy Fuel Co., Respondent.

BY STANLEY B. HOUCK,

Attorney for Respondent,

910 McKnight Building,

Minneapolis, Minnesota.

FILE COPY

MAY 20 1929
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 874 75

ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER,
vs.
G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF

The New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company, Southern Railway Company, The New York, New Haven & Hartford Railroad Company, Norfolk & Western Railway Company, Central Railroad of New Jersey, Western Maryland Railroad Company, Atlantic Coast Line Railroad Company, Great Northern Railway Company, Minneapolis, St. Paul & Saulte Ste. Marie Railway Co., The Minneapolis & St. Louis Railroad Company, W. H. Bremner, Receiver; Atchison, Topeka & Santa Fe Railway, and Missouri-Kansas-Texas Railroad Company,

FOR LEAVE TO FILE A STATEMENT, AMICI CURIÆ, IN SUPPORT OF PETITION FOR CERTIORARI HEREIN.

FREDERIC D. McKENNEY,
Attorney for the Pennsylvania Railroad Company and Others.

W. F. WEST,
S. R. PRINCE,
A. W. BLACKMAN,
F. M. RIVINUS,
CHARLES E. MILLER,
M. K. ROTHSCHILD,
W. E. KAY,
F. G. DORETY,
GEORGE A. KINGSLEY,
C. W. WRIGHT,
E. E. McINNES,
JOSEPH M. BRYSON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

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ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER,

vs.

G. I. CRAIL, DOING BUSINESS AS P. MCCOY FUEL COMPANY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF

The New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company, Southern Railway Company, The New York, New Haven & Hartford Railroad Company, Norfolk & Western Railway Company, Central Railroad of New Jersey, Western Maryland Railroad Company, Atlantic Coast Line Railroad Company, Great Northern Railway Company, Minneapolis, St. Paul & Saulte Ste. Marie Railway Co., The Minneapolis & St. Louis Railroad Company, W. H. Bremner, Receiver; Atchison, Topeka & Santa Fe Railway, and Missouri-Kansas-Texas Railroad Company,

---

FOR LEAVE TO FILE A STATEMENT, AMICI CURIÆ, IN SUPPORT OF PETITION FOR CERTIORARI HEREIN.

Now come The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company and each of the other common carriers whose

names are above set forth and signed hereto, and representing to the Court their pecuniary interest in and concern with the important question of general law sought to be brought before this Court for its consideration and final disposition by means of the Petition for Certiorari filed by the Illinois Central Railroad Company as Petitioner, wherein G. I. Crail, doing business as P. McCoy Fuel Company, is named as Respondent, and severally move this Honorable Court for leave to file *Amici Curiæ*, the following statement and suggestions in support of said Petition.

Written consent to the filing of this Statement and for its submission to the Court with other papers pertaining to said Petition for Certiorari, subscribed by counsel of record for both said Petitioner and said Respondent, has been lodged with the Clerk of this Court.

As ground for this motion it is respectfully shown that each of the carrier companies named above and party hereto is a common carrier of freight by steam railroad subject to the provisions of the Act to Regulate Commerce, as amended, and as such, and because of losses occurring in the course of freight transportation, is subjected to frequent and constantly recurring claims for damages, many of which claims are well grounded upon the facts involved, but cannot be promptly and amicably settled between the shippers or consignees and the carrier concerned because of the diverse views of courts, both Federal and State, as set

forth in the reports, as to the measure of damages properly to be applied in given circumstances, with result that irritation between shippers and consignees or other users of such common carrier services is engendered, the volume of litigation is unnecessarily increased, and the prompt allowance of many meritorious claims for losses which have occurred and in the future without doubt will frequently occur, is prevented.

It is believed that the question of law presented by the record in this cause is of nation wide interest. The numerous authorities assumedly in point and cited by the District Court and by the Circuit Court of Appeals for the Eighth Circuit; the differing conclusions expressed therein, and the opposed conclusions of said courts, based on each court's appreciation of the cases so cited, bear speaking judicial testimony to the necessity, in furtherance of uniformity of decision, of an authoritative exposition and reconcilement of the fundamentals involved.

The shipment involved in the instant case, as well as those likely to be involved in pending and future claims against amotioners and other common carriers who may be similarly circumstanced, involve movements of freights in interstate commerce on uniform bills of lading.

In such cases it is provided by law (Cummins Amendment, Act of March 4, 1915, 38 Stat. 1196, ch. 176; U. S. Code, Title 49, Chapter 1, Transportation, Sec. 20), that any common carrier railroad subject to the provisions of the Act to Regulate Commerce, as amended,

who shall receive or move property in interstate commerce shall be liable to any holder of or party entitled to recover on any receipt or bill of lading covering such property "the full actual loss, damage, or injury to such property caused by it," the carrier.

While it has been said that the prime effect of this amendment was not to establish a new rule for the measurement of damages for losses attaching to goods in transit but only to prevent effective limitation of carriers' liability therefor, nevertheless, question as to elements and rule by which any such "full actual loss, damage or injury to such property" shall be ascertained, persists.

It is not difficult to agree that ascertainable market value of such or similar goods at place and time of contract delivery shall constitute the generally applicable measure of damage for loss sustained, but where two or more differing market values, dependent upon vicarious circumstances, exist at point of delivery at the same time, *e. g.*, wholesale or large lot and retail or small lot value, the question as to which of such values shall be used to ascertain and measure the "full *actual* loss and damage," of a large lot shipper who has suffered a small lot loss, possibly by dribbling or pilfering from the mass in transit, in circumstances not requiring prompt or even eventual replacement, there is presented, as in the instant case, a question as to the solution of which many courts have differed, and, in the absence of some illuminating pronouncement by this Court which is of final resort in such matters, will undoubtedly continue to differ as heretofore thus causing existing confusion to become but the worse confounded.

In the instant case both the District Court and the Circuit Court of Appeals concurred in and stressed the thought that the value of the 5,500 pounds of coal lost from the carload shipment while in transit, measured the owner-consignee's full actual loss and damage, but the learned District Court thought and ruled that the value of the lost coal *in the car* at place of delivery, rather than the retail price at which it could be replaced there—no such replacement being either called for or in contemplation by either party—measured to the owner's "full *actual* loss" (2 Fed. (2d), 287, 288), while the learned Circuit Court of Appeals, in reversing the trial court, thought and ruled (13 Fed. (2d) 459, 461) that the shipment in question being interstate and governed by the Cummins Amendment above referred to, the true measure of damages prescribed for the carriers' breach of its contract to transport and deliver the coal that was lost in transit, was "the fair average market value at the time and place of delivery, of such a quantity of like coal" as the carrier had failed to deliver—that is, what it would have cost the owner at such time and place to purchase coals in the open retail market to replace those lost, although such replacement was not made, nor necessary, nor was in contemplation of the parties at initiation of the transportation service, or at the delivery accepted by consignee of what remained (Stipulation of Facts, VIII, Rec. 9).

On giving judgment on the new or second trial of the case (21 Fed. (2d) 836), the learned District Court (Cant, D. J.), as in duty bound by reason of the opin-

ion of the Court of Appeals allowed plaintiff to recover from the carrier at the retail market price at which the lost coal could have been replaced in the vicinage of point of delivery, but having pointed out that the case was of "unusual interest and importance," and expressing "the fullest measure of respect for the appellate court," he proceeded "to offer further suggestions in the interest of justice upon the questions involved," as the appellate tribunal itself might "at some time wish to reexamine the matters which are here in controversy (*ibid*, 836).

The "suggestions" so respectfully submitted, were cogent and seemingly worthy of consideration on part of the appellate tribunal, which, however, contented itself (Kenyon, Cir. Jus. speaking) with a mere reference thereto in connection with further reference to its own earlier reported opinion, and statement to effect that the two together would afford "full enlightenment as to the facts," concluding as follows (31 Fed. (2d) 111):

> "We are satisfied that the case now presented is the identical one presented to this court and decided in 13 F. (2d) 459. We are therefore confronted with the question as to whether or not on the second writ of error we should reconsider the legal question decided when the case was here before, *i. e.*, the rule of damages to be applied for the loss of the coal in shipment. The rule laid down by this court in its former decision became the 'law of the case.' While it is within the power of the courts to disregard the rule of 'law of the case' in the interest of justice, it is the general practice of courts to refuse

'to reopen what has been decided.' (Citing cases.)"

It is worthy of comment that both the learned Circuit Court of Appeals for the Eighth Circuit in its first opinion (13 Fed. (2d) 459, 461) and the learned District Judge, in the course of his "respectful suggestions" on second trial (21 Fed. (2d) 836, 837) quoted from the opinions of this Court in the cases of

Southern Pacific Co. *v.* Darnell Taenzer Co., 245 U. S. 531; and

Chicago, M. & St. Paul Ry. Co. *v.* McCaull-Dinsmore Co., 253 U. S. 97,

to opposing effects and with contradictory conclusions.

Wherefore, in the general interest of uniformity of decision, both as betwixt the Federal and also as betwixt and between the Federal and numerous State courts; and also because the Circuit Court of Appeals of the Eighth Circuit has decided an important question of general law in a way probably untenable and at the same time has also decided an important and widely interesting question of Federal law which seemingly has not yet been but certainly should be settled by this honorable Court; and also has decided a question of Federal law of general import in a way probably in conflict with decisions of this Court which may be deemed, in some measure at least, applicable thereto;

It is respectfully urged upon this Honorable Court, in the beneficient exercise of the discretionary power conferred upon it by the provisions of Section 240 of

the Judicial Code (U. S. Code Sec. 347), that the writ of certiorari prayed by the petition of said the Illinois Central Railroad Company reasonably should be granted.

Respectfully submitted,

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
By W. F. WEST,
Assistant General Solicitor;
THE PENNSYLVANIA RAILROAD COMPANY,
By FREDERIC D. McKENNEY,
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SOUTHERN RAILWAY COMPANY,
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THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By A. W. BLACKMAN,
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ATLANTIC COAST LINE RAILROAD COMPANY,
By W. E. KAY,
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GREAT NORTHERN RAILWAY COMPANY,
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By C. W. WRIGHT,
General Attorney;
ATCHISON, TOPEKA & SANTA FE RAILWAY,
By E. E. McINNES,
General Solicitor;
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
By JOSEPH M. BRYSON,
General Counsel.

May, 1929.

SUPREME COURT OF THE UNITED STATES.

No. 75.—October Term, 1929.

Illinois Central Railroad Company, Petitioners, *vs.* G. I. Crail, Doing Business as P. McCoy Fuel Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 24, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted May 27, 1929, to review a ruling of the Court of Appeals for the Eighth Circuit upon the measure of damages recoverable in a suit brought under the Cummins Amendment of March 4, 1915, 38 Stat. 1197, as amended 41 Stat. 494 [49 U. S. C., § 20(11)], against a rail carrier for failure to deliver a part of an interstate shipment of coal.

Respondent, plaintiff below, a coal dealer in Minneapolis, purchased, while in transit, a carload of coal weighing at shipment 88,700 pounds. On delivery at destination, the respondent's industrial siding, there was a shortage of 5,500 pounds. At the time of arrival, respondent had not resold any of the coal. It was intended to be, and was, added to his stock of coal for resale, but the shortage did not interfere with the maintenance of his usual stock. He lost no sales by reason of it, and purchased no coal to replace the shortage, except in carload lots. In the course of his business, respondent could and did, both before and after the present shipment, purchase coal of like quality in carload lots of 60,000 pounds or more, delivered at his siding, at $5.50 per ton, plus freight. The market price in Minneapolis for like coal sold at retail in less than carload lots was $13.00 per ton, including $3.30 freight.

The case was twice tried. On the first trial, the District Court gave judgment for the wholesale value of the coal not delivered. 2 F. (2d) 287. The Court of Appeals reversed the judgment, holding that it should have been for the retail value of the coal. 13

F. (2d) 459. Upon retrial, the District Court gave judgment accordingly, 21 F. (2d) 831, which was affirmed below. 31 F. (2d) 111.

By the Cummins Amendment the holder of a bill of lading issued for an interstate rail shipment is entitled to recover for failure to make delivery of any part of the shipment without legal excuse, "the full actual loss, damage or injury to such property" at point of destination. *Chicago, etc. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97.

It is not denied that a recovery measured by the wholesale market price of the coal would fully compensate the respondent, or that the retail price, taken as the measure of the recovery allowed below, includes costs of delivery to retail consumers which respondent did not incur, and a retail profit which he had not earned by any contract of resale. But respondent contends, as was held below, that the established measure of damage for non-delivery of a shipment of merchandise is the sum required to replace the exact amount of the shortage at the stipulated time and place of delivery, which, in this case, would be its retail value, and that convenience and the necessity for a uniform rule require its application here.

This contention ignores the basic principle underlying common law remedies that they shall afford only compensation for the injury suffered, *Milwaukee, etc. R. R. Co.* v. *Arms, et al.*, 91 U. S. 489, 482; *Chicago, etc. Ry. Co.* v. *McCaull-Dinsmore Co., supra*, 100; *Robinson* v. *Harman*, 1 Exch. 850, 855; Sedgwick, Damages (9th Ed.) 25; Sutherland, Damages (4th Ed.) § 12; Williston on Contracts, § 1338, and leaves out of account the language of the amendment, which likewise gives only a right of recovery for "actual loss". The rule urged by respondents was applied below in literal accordance with its conventional statement. As so stated, when applied to cases as they usually arise, it is a convenient and accurate method of arriving at an amount of recovery which is compensatory. As so stated, it would have been applicable here if there had been a failure to deliver the entire carload of coal, since the wholesale price, at which a full carload could have been procured at point of destination, would have afforded full compensation. *Milwaukee, etc. Ry. Co.* v. *McCaull-Dinsmore Co., supra; Central of Georgia Ry. Co.* v. *American Coal Co.*, 28 Ga. App. 95; *Wendnagel* v. *Houston*, 155 Ill. App. 664; *Lake Erie, etc. R. R. Co.* v. *Frantz*, 85 Ind. App. 569; *Cutting* v. *Grand Trunk Ry.*, 13 Allen.

381; *Crutchfield & Woolfolk* v. *Director General of R. R.*, 239 Mass. 84; *Smith* v. *N. Y. O. & Western Ry. Co.*, 119 Misc. Rep. (N. Y.) 506; *Yazoo & M. V. R. Co.* v. *Delta Grocer Co.*, 134 Miss. 846; *Chicago, R. I. & Pac. Ry. Co.* v. *Broe*, 16 Okla. 25; *Roth Coal Co.* v. *Louisville & Nashville R. R.*, 142 Tenn. 52; *Quanah A. & P. Co.* v. *Novitt*, 199 S. W. 496 (Tex. Civ. App.), or, in some circumstances, if respondent had been under any constraint to purchase less than a carload lot to repair his loss or carry on his business, for in that event the measure of his loss would have been the retail market cost of the necessary replacement. *Haskell* v. *Hunter*, 23 Mich. 305, 309. But in the actual circumstances the cost of replacing the exact shortage at retail price was not the measure of the loss since it was capable of replacement and was, in fact, replaced in the course of respondent's business from purchases made in carload lots at wholesale market price without added expense.

There is no greater inconvenience in the application of the one standard of value than the other and we perceive no advantage to be gained from an adherence to a rigid uniformity, which would justify sacrificing the reason of the rule, to its letter. The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise not applicable. See *Wilmoth* v. *Hamilton*, 127 Fed. 48, 51; *Theiss* v. *Weiss*, 166 Pa. St. 9, 19; *Pittsburg Sheet Mfg. Co.* v. *West Penn Sheet Steel Co.*, 201 Pa. St. 150; Williston on Contracts, §§ 1384, 1385. In the absence of special circumstances, the damage for shortage in delivery by the seller of fungible goods sold by quantity is measured by the bulk price rather than the price for smaller quantities, both at common law, see *Morgan* v. *Gath*, 3 H. & C. 748; *Avery* v. *Wilson*, 81 N. Y. 341, and under § 44 of the Uniform Sales Act. Likewise, we think that the wholesale market price is to be preferred as a test over the retail when in circumstances like the present, it is clearly the more accurate measure. *Brown Coal Co.* v. *Illinois Central R. R. Co.*, 196 Iowa, 562; see *State* v. *Smith*, 31 Mo. 566; *Wendnagel* v. *Houston, supra*, 666, 667; *Wood Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 320 Ill. 341. Compare *Heidritter Lumber Co.* v. *Central R. R. of N. J.*, 100 N. J. Law, 402, *Leominster Fuel Co.* v. *New York, N. H. & H. Ry. Co.*, 258 Mass. 149, cited as supporting the conclusion of the court below. In these cases it does not clearly appear whether the consignee

suffered special damage by reason of the shortage, measured by the retail price, or whether he did or could replace it at the wholesale price in the ordinary course of business.

The court below thought that the fact that the award to respondent of the expense and profit, included in the retail price to consumers, did not militate against the rule it applied, for the reason that the wholesale price, as is often the case where market price is the measure of loss, likewise included a profit over mine cost plus freight. But respondent had done every act and incurred every expense prerequisite to procuring delivery at destination. Any profit included in its market value at the stipulated time and place of arrival was, therefore, appropriately included in the measure of his loss. In this respect it is distinguishable from the expense and prospective profit not actually incurred or earned by respondent, represented by the retail price. See *Central of Georgia R. R. Co.* v. *American Coal Co., supra; Yazoo & M. V. R. Co.* v. *Delta Grocer Co., supra,* 146. Compare *No. & T. P. Ry. Co.* v. *Hansford,* 125 Ky. 37; *Smith* v. *N. Y. O. & Western Ry. Co., supra; Quanah A. & P. Co.* v. *Novitt, supra.*

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.